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22 I.A.^{3D} 13

73-184

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L. L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
September 10, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

FILED

No. 73-184

SEP 10 1974

JOHN L. SIEGIZ, Clerk of the Court
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellant,)	
)	
IN THE INTEREST OF	)	Appeal from the Circuit
	)	Court of the Nineteenth
	)	Judicial Circuit, Lake
JAMES GALLAGHER, a Minor,	)	County, Illinois.
)	
Respondent-Appellee.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

A delinquency petition was filed against the twelve year old respondent on October 18, 1972, alleging five counts of murder and two counts of involuntary manslaughter arising from the shooting and death of respondent's sister, Eileen G. Gallagher, which occurred on October 16, 1972. Respondent filed a motion to suppress certain statements made by him on October 17, 1972, to police officers, alleging the failure to give the warnings required by Miranda v. Arizona (1966), 16 L ed 2d 694. Following an evidentiary hearing the trial court granted the motion. The State appeals.

Respondent has filed a motion to dismiss the appeal which we have taken with the case. He reasons that the order appealed from suppresses statements and not confessions and is, in effect, an appeal from an evidentiary ruling; and that therefore an appeal does not lie under Supreme Court Rule 604(a)(1). (Ill.Rev.Stat. 1971, ch. 110A, par. 604(a)(1).) The State answers that the appeal

is not based on evidentiary rulings of the trial judge but upon his error of law in applying Miranda to non-custodial questioning.

The motion to suppress stated that it was made pursuant to Ill.Rev.Stat. 1971, ch. 38, par. 114-11. This statutory provision is directed at the suppression of confessions. We note that the introductory portion of the motion refers to "statements and confessions", but the allegations of the motion and the prayer refer solely to statements. And from an examination of the record, it appears that statements rather than confessions were involved. In any event, however, we do not agree that the State's right to appeal an order of suppression is available only when confessions and not when statements which contain admissions are involved. In a hearing to determine voluntariness there is no real distinction between incriminating statements and confessions. (See People v. Lefler (1967), 38 Ill.2d 216, 220; cf. People v. Peck (1974), 18 Ill.App.3d 112, 115.) A suppression order resulting from a hearing to determine the voluntariness of either an incriminating admission or a confession is "other than a final judgment" from which the State may appeal under Supreme Court Rule 604. (Ill.Rev.Stat. 1971, ch. 110A, par. 604.) See People v. Taylor (1971), 50 Ill.2d 136, 140; People v. Marotta (1972), 3 Ill.App.3d 280, 282. See also, People v. Courtright (1970), 129 Ill.App.2d 244, 245.

Respondent's reliance on People v. Koch (1973), 15 Ill.App. 3d 386, 389, is misplaced. Koch cited People v. Stanton (1959), 16 Ill.2d 459, in support of a distinction between admissions and confessions for purposes of appeal under Ch. 38, par. 114-11(g). However, the issue in Stanton was whether statements were admitted without compliance by the State with the provision that a list of witnesses to any oral or written confession before law enforcement officers and agents be furnished to the defendant (an analogous

provision to Ill.Rev.Stat. 1971, ch. 38, par. 114-10). Such provision deals only with confessions, and while a distinction between admissions and confessions might reasonably apply with respect to section 114-11(g), it is not determinative as to the appeal provisions of Supreme Court Rule 604.

We, therefore, deny respondent's motion to dismiss the appeal and consider the case on its merits.

At the evidentiary hearing held on the motion to suppress, Lake County Deputy Harceg testified that about 11:40 A.M. on October 17, 1972, he and Corporal Harper, both wearing plain clothes, arrived at the Ryan home in Barrington. The Ryans were neighbors of the Gallagher family. Mr. Ryan introduced Harceg to the respondent's father, John Gallagher, Sr., and in turn Harceg introduced Harper. Harceg asked to talk to either James or John, Mr. Gallagher's sons. Mr. Gallagher asked which one and when the officer specified James, his father went to another part of the house and returned with him. Harceg testified that six to eight people were present in the house at the time including Mrs. Gallagher. The officer testified that they were investigating the possibility that someone in the family had knowledge or had something to do with the events of the preceding day at the Gallagher home.

Harceg said that the two officers, Mr. Gallagher and James went upstairs to a bedroom and once inside Mr. Gallagher was asked if he wanted to remain but responded that he did not. The door was closed with respondent being left alone with the two officers. During the fifteen to thirty minutes of conversation, respondent was not arrested, no threats or promises were made and respondent made no attempt to leave. At one point Harper held respondent's hand.

Harceg also testified that while talking to respondent, the officers had in their possession a pair of boots, one of which

was spoiled with reddish spots which both officers thought were blood. The conversation then centered on the ownership of the boots which were shown to James. When asked if they were his, James reportedly responded that they were his at one time but that they were being used by his brother because they were snug. Harper fitted the unsoiled boot on respondent's foot and declared that they did not appear snug. Harper then showed respondent the soiled boot and asked him "How the blood got on the boot?". James answered that he didn't know. During the questioning respondent said he intended to wear the boots that day; and when the officers asked him where they had been, James said they were on the bed next to his sister.

Harceg testified that James was not given the Miranda warnings until after these responses. He also testified that subsequent laboratory analysis revealed that the stains were not blood stains.

Harper corroborated Harceg's testimony in material part and explained that he believed the investigation to have been "more or less a preliminary investigation to gather information, more of a field interrogation is what it was, or not interrogation, but questioning". He stated that when he held James' hand the boy made no attempt to get out of his chair or leave; and that no promises were made to him. Following the giving of the Miranda warnings, Harper testified, respondent was also asked whether "he was wearing the boots with the blood on them, while he was standing by his sister in the bedroom?".

James testified at the hearing that he heard no conversation between the officers and his father, once he was in the bedroom, concerning whether Mr. Gallagher should leave. He also stated that the officers were already in the room when his father took him there. His back was to the door during the questioning and he denied that he was ever told of any rights.

Mr. Gallagher testified that the officers only asked to speak to James and that they requested a private place to talk. He did not recall whether all four went up together or whether the police were in the bedroom first. He claimed he was neither asked to leave or stay and his only discussion with the officers at the bedroom concerned furnishing chairs and ash trays. He closed the door and went to the living room while his son and the officers remained in the bedroom.

Mr. Gallagher also stated that the day after the interview Deputy Harceg had said in a conversation with him that the Sheriff's office, particularly himself and Harper, were sure on the night of the 16th before the interview that it was James who was involved.

The State contends that as a matter of law the respondent was not in custody when questioned and therefore Miranda is inapplicable. The State does not deny that the credibility of the witnesses was a matter for the determination by the trial court, and that its findings as to the voluntary character of statements must be upheld if not against the manifest weight of the evidence. (People v. Carter (1968), 39 Ill.2d 31, 38.) The State reasons that whether custody exists must be tested by objective standards which override contrary conclusions where the record is barren of facts indicating a coercive atmosphere. E.g. United States v. Glenn Hall (2d Cir. 1969), 421 F.2d 540, 544; United States v. Essex (E.D. Tenn. 1967), 275 F. Supp. 393, 397; State v. Hunt (1968), 447 P.2d 896; Hoffa v. United States (1966), 17 L ed 2d 374, 383; People v. Yuki (N.Y. 1969), 256 N.E.2d 172, 174.

We agree that there may be cases in which the evidence taken in any reasonable aspect clearly shows that non-custodial interrogation is involved as a matter of law (e.g., People v. Shipp (1968), 96 Ill.App.2d 364, 367; Jackson v. State (Md. App. 1969), 259 A.2d 587, 589; People v. P. _____ (N.Y. 1967), 233 N.E.2d 255, 261;

Steigler v. Superior Ct. (Del. 1969), 252 A.2d 300, 305; State v. Hall (1970), 468 P.2d 598, 600; Lowe v. United States (9th Cir. 1969), 407 P.2d 1391, 1394; United States v. Littlepage (5th Cir. 1970), 435 F.2d 498, 499.) However, the record here is replete with evidence which negates the State's contention.

The instant record fully supports the finding of the trial judge that James Gallagher was undergoing custodial interrogation within the purport of Miranda. The questioning was psychologically oriented: the minor was questioned in private; a sympathetic and kind attitude was shown by the juvenile officers; the minor was confronted with boots which were assumed by the officers, without verification, to contain blood stains, thereby presuming the guilt of the minor; and there was evidence that prior to the questioning, James was the prime suspect. This form of questioning falls clearly within the specific area of concern expressed in Miranda v. Arizona, 16 L ed 2d 694, 709-710.

We therefore affirm the order of the trial court suppressing evidence.

Affirmed.

THOMAS J. MORAN, P.J. and RECHENMACHER J. concur.

22 I.A.^{3D} 39

73-106

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L.L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk Pro Tem
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
September 13, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

FILED

SEP 13 1974

LOREN J. STADTZ, Clerk pro tem
Appellate Court, 2nd District

No. 73 106

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

SAVANNAH GARDENS, INC., an)	
Illinois Corporation,)	
)	
Plaintiff-Appellant,)	
)	
v.	)	Appeal from the Circuit
	)	Court for the 16th
PAUL D. GRANOFF, M.D. and	)	Judicial Circuit,
DEBRA GRANOFF,	)	Kane County, Illinois.
)	
Defendants-Appellees.)	

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

This is an appeal from the judgment of the circuit court of Kane County in an action for rent and damage to the leased premises.

The defendants, Dr. Paul Granoff and his wife, leased the apartment in question from the plaintiff for the term of one year from July 27, 1971 to July 26, 1972, on a monthly basis of \$250 per month. The testimony at the trial indicated that Dr. Granoff informed the plaintiff's manager, a Mr. Peterson, in September or early October, 1971, that he was building a new home and would be leaving the apartment as soon as the house was ready, probably sometime in February of 1972. Dr. Granoff testified regarding his conversation with Mr. Peterson at that time; "I wanted to make certain I would be able to not jeopardize my position in terms of the apartment. I talked with Mr. Peterson at that time." Dr. Granoff testified

he told Peterson the prospective date for the move was February, 1972, and he asked Peterson to be on the lookout for people who might wish to sublet the apartment and that Peterson agreed to be on the lookout for such people and remarked that they "had plenty of time."

Subsequently, on December 31, 1971, Dr. Granoff gave Peterson written notice they were leaving the apartment on January 31, and on February 12, 1972, the Granoffs actually did vacate the apartment.

At the time they leased the apartment the Granoffs made a security deposit of \$200 which was to be refunded in the words of the lease, "after the keys are returned to the agent and the premises are found, upon inspection, to be in clean condition with no unusual damage--ordinary wear and tear excepted." After the Granoffs left the apartment Mr. Peterson testified he ran a special advertisement, in addition to their regular advertising, in an attempt to rent the apartment but did not succeed in renting it until June 12, 1972. On February 18, Peterson sent a letter to the Granoffs detailing what he called, "liquidating damages" for early termination of the lease, showing an amount due of \$580.31. This was comprised of rental for the period from February 1, 1972 to February 12, 1972, plus \$500 (being two months' rent) for early termination of the lease, plus some items of damage to the apartment and less the \$200 security deposit.

The lease contained a provision for two months' rent to be paid as a "release fee" in the event of early

termination of the lease, however, this provision of the lease was to be applicable "if it became necessary to move from the county in which your apartment is located", which was not the case here. There was no provision in the lease for early termination if the tenant remained in the same county. It is evident from the testimony of the plaintiff's agent, Peterson, that he regarded the two months' rent referred to in the letter of February 18 as confirmation of his earlier conversation with the defendant regarding early termination of the lease.

The Granoffs did not respond to this letter and upon their failure to pay the amount demanded or any other payment, this suit was commenced, the original addendum based on the letter, being subsequently increased to cover actual rental for the unexpired term, as well as claimed damage to the apartment, including some damages allegedly done by Dr. Granoff's two dogs.

The case was tried without a jury and at the conclusion of the trial, the court rendered what was, in effect, a judgment for the defendants. The plaintiff's claim was based mainly on the rental lost during the unexpired term of the lease and while the trial court made no express finding of either law or fact on the question of the defendants' continuing liability under the lease, by ignoring the plaintiff's claim based on the lease, he by implication, ruled that there had been, as contended by the defendants, a surrender of the premises by the defendants and acceptance thereof by the plaintiff, thereby cancelling the lease.

The court also held the provision in Paragraph 12 of the lease with regard to payment of two months' rent for early termination to be not applicable under the facts and also void as "against the law" (apparently meaning against public policy). He found the damage to the apartment to be not more than ordinary wear and tear. Accordingly, the trial court held the defendants liable only for the rental on a daily basis from February 1 to February 12, 1972 (their day of departure) in the amount of \$99.96, plus \$16 for drayage expense for removing debris left in the apartment. He subtracted this total of \$115.96 from the defendants' security deposit of \$200 and then held the defendants were entitled to a judgment of \$84.04 to be returned to them.

In this appeal the plaintiff contends that the trial court erred in allowing the defendants to vacate the premises without liability for rent for the unexpired term of the lease and also in his ruling that the provisions in the lease for payment of two months' rent for early termination was void because it amounted to a penalty. While there was some testimony at the trial with regard to mitigation of damages and this question is raised in the plaintiff's brief, there was no finding of either fact or law by the court on this question.

This court will not disturb a finding of fact by the trial court unless we believe it to be against the manifest weight of the evidence. In this case, while there was no express finding of fact by the trial court that there had been a surrender back and acceptance thereof by the plaintiff of the leased premises, thus cancelling the lease, the court in effect so held by ignoring the plaintiff's claim for

rent for the remaining period of the lease. Based on the tentative conversation testified to by the defendant between himself and the plaintiff's agent, Peterson, and the testimony of Peterson himself, we must conclude that the implied finding by the trial court that there had been a surrender of the leased premises and an acceptance of such surrender which cancelled the lease, is against the manifest weight of the evidence.

We do not here consider the legal effect of the provision in the lease for payment of two months' rent in event of early termination of the lease. This provision was not strictly applicable to the facts of this case because it was to be applied to a situation where the tenant moved from the county where the apartment was located. We do not construe this provision as intending to enforce a penalty because the tenant moved out of the county and we regard it as a mitigating provision in favor of the tenant where changed circumstances required his removal out of the county. Since this provision is not strictly applicable to the circumstances before us, we conclude that the plaintiff's letter of February 18 in which plaintiff billed the defendants for two months' rent in addition to certain claimed damage, for "ending lease ahead of time" should be regarded as an offer of settlement, not within the strict terms of Paragraph 12 of the lease, but based on that paragraph in arriving at "liquidating damages".

As noted above, the provision for payment of two months' rent in the event of early termination was not strictly applicable to the facts of this case, therefore it should not be regarded, as the trial judge did, from the standpoint of a

lease provision being construed in the light of public policy, but rather as a mere offer of settlement based on previous conversations between the plaintiff and the defendant. It is unnecessary under the circumstances to discuss its enforceability based on the distinction between a penalty provision and one merely for liquidated damages and any such discussion in this opinion would be mere dicta.

In view of our holding that the trial court erred in holding, in effect, that based on the testimony at the trial, there had been an agreement to surrender the premises back to the landlord without further liability for rent, there must be a new trial.

Reversed and remanded for further proceedings not inconsistent with this opinion.

GUILD and SEIDENFELD, JJ., concur.

73-226

UNITED STATES OF AMERICA

State of Illinois)
 Appellate Court) ss.
 Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 3rd day of December, in the year of our Lord one thousand nine hundred and seventy-three, within and for the Second District of Illinois:

Present -- Honorable ALBERT SCOTT, Acting Presiding Justice
 Honorable WALTER S. DIXON, Justice
 Honorable DANIEL H. DAILEY, Justice
 LOREN J. STROTZ , Clerk Pro Tem
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On September 17, 1974 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

SEP 17 1974

No. 73-226

LORIN J. STROTZ, Clerk pro tem.
Appellate Court, 2nd District

STATE OF ILLINOIS
APPELLATE COURT
SECOND DISTRICT

Abstract

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
DON M. MARYAN,)
)
Defendant-Appellant.)

Appeal from
Circuit Court
19th Judicial Circuit
Lake County

Mr. JUSTICE DAILEY delivered the opinion of the Court:

This is an appeal from the denial of a motion for a Writ of Habeas Corpus filed pursuant to the Uniform Criminal Extradition Act challenging the legality of appellant's arrest and impending extradition to Missouri.

A Governor's warrant was issued on March 8, 1973, charging Don M. Maryan with being a fugitive from justice from the State of Missouri. Mr. Maryan was subsequently arrested and on March 28, 1973, he filed a motion for a Writ of Habeas Corpus. Hearing on the motion was held on April 6, 1973, at which time said writ was denied.

In Missouri in 1969, Mr. Maryan was convicted of auto theft and placed on three years probation with a termination date of November 4, 1972. Supervision of Mr. Maryan's probation was transferred to Illinois. Approximately one month prior to the termination date of probation, the Lake County, Illinois Probation Department advised Missouri officials that Mr. Maryan had failed to pay court costs and defender fees incurred in the Missouri litigation and also had been delinquent in reporting.

On November 1, 1972, a complaint and warrant were issued by the court pursuant to Chapter 60, Section 30 of the Illinois Revised Statutes, charging Mr. Maryan with being a fugitive from justice. Mr. Maryan was arrested on December 8, 1972.

Pursuant to Mr. Maryan's Motion this cause was dismissed by the Court on February 14, 1973. On March 16, 1973, the cause was reinstated on motion of the State pursuant to a Governor's warrant issued on March 8, 1973.

Appellant contends that he had satisfied the Missouri sentence and was therefore no longer charged with a crime within the meaning of the Extradition Act.

The only documentary evidence in the record is ^{the} warrant of the Governor of Illinois. Appellant testified only as to conviction and placement on probation in Missouri. The Lake County Probation officer testified as to his supervising the probation for the State of Missouri. No other evidence was presented.

In a Habeas Corpus proceeding the only matters which can be examined are: (1) Whether the accused is the person named in the warrant; (2) Whether he is substantially charged with a crime in the demanding State; (3) Whether the documents are in regular form. (People v Smith, 12 Ill. App. 3rd 9, 297 N.E. 2d 29, People ex. rel. Levin v. Ogilvie, 36 Ill. 2d 566, 224 N.E. 2d 247.) In the case at bar the defendant was unable to successfully show that any of these elements was irregular.

The record does not contain a request from the Governor of Missouri requesting defendant's rendition, and such a request is an essential prerequisite to the issuance of a warrant by the Governor of Illinois. (People ex. rel. Willis v. Mulcahy, 392 Ill. 411, 64 N.E. 2d 860.) Where this requisition is lacking in the record but the recitals in the warrant issued in the asylum state are uncontradicted by evidence, such recitals are accepted as true. People ex. rel. Flowers v. Gruenewald 390 Ill. 79, 60 N.E. 2d 225.

The Governor's warrant ordered appellant arrested and delivered to an agent of the State of Missouri. The trial judge correctly determined that "the defendant return and resolve his differences with the State (of Missouri)".

Appellant additionally contends the purpose of this extradition was to collect a debt (court costs).

Appellant states, "Even assuming that the payment of court costs and defender fees was a condition of Mr. Maryan's probation, it is still not an appropriate function, however deviously disguised, to employ the Uniform Criminal Extradition Act in the collection of debts."

Payment of court costs is a valid term of probation in Illinois and there should be no different rule herein.

In addition to principles stated above, if a defendant may be extradited for violation of probation, as appellant concedes in his brief, extradition herein is authorized.

Appellant contends that the State failed to present sufficient evidence, after presumptions of Governor's warrant had been negated, to justify denying the Writ of Habeas Corpus.

The Court finds the prima facie evidence of the Governor's warrant was not sufficiently contradicted to require the State to introduce additional evidence.

As the Court in Gruenewald, noted above, the defendant himself could have secured any supporting documents from the State of Missouri which were transmitted to the Governor of Illinois in order to establish his contention that he was being extradited solely for a minor probation violation. In Gruenewald the Court stated "these papers were not in the possession or under the control of (the State's Attorney). They were public records of the Governor's office, authenticated copies of which were admissible in evidence and were available to anyone."

The appellant contends the Court erred in denying the Writ of Habeas Corpus when the Governor's warrant recited as its

'basis a complaint and warrant charging Mr. Maryan with auto theft and the evidence indicated that Mr. Maryan had already been charged, convicted, and sentenced for that particular crime.

This issue has no merit. In People^{ex rel. Brown} v. Jackson, 49 Ill. 2d 209, 274 N.E. 2d 17, it was held that the Governor's rendition warrant reciting that the demand of the Governor of Louisiana was based upon an affidavit made before a magistrate charging the crime of armed robbery in Louisiana was sufficient to support the extradition of the defendant to Louisiana, even though the papers supporting the Governor's demand showed that the defendant had previously been convicted of that charge.

The Court finds the Circuit Court did not err in denying the Writ of Habeas Corpus herein.

AFFIRMED.

Scott, Acting P.J., and Dixon, J., concur.

73-122

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L.L. RECHENMACHER, Justice
 LOREN J. STROTZ , Clerk Pro Tem
 JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
September 18, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

SEP 18 1974

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit
) Court for the 19th
LE ROY PERKINS,) Judicial Circuit,
) Lake County, Illinois.
Defendant-Appellant.)

LOREN J. SHOLTZ, Clerk pro tem
Appellate Court, 2nd District

MR. JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant was found guilty by a jury of armed robbery and robbery, and was sentenced to a term of 10 to 30 years. He contends he was not proved guilty beyond a reasonable doubt of either offense and that the trial court erred in receiving in evidence certain items.

The complaining witness, Willie Thomas, testified that shortly after 11 p.m. on the night of June 18, 1972, on his way to a corner grocery, he saw its lights go out and started returning home. On the way he met an individual (whom he later identified as defendant). After some conversation they made a vain attempt to go into a tavern (which was brilliantly illuminated in front) for the purpose of buying a bottle of liquor. As Mr. Thomas and defendant resumed their walk toward Mr. Thomas's home defendant asked him if he carried a gun. Receiving a negative response defendant drew out a black pistol, hit Mr. Thomas knocking him down "into the bushes", asked for his billfold, beat him on the head and chest, and took everything out of his pockets. While beating Mr. Thomas defendant had the gun in his hand and pulled its hammer back, held the gun "right in" his face and threatened to kill him. When defendant left Mr. Thomas got up, ran home

and called the police. He testified that among the items taken from him were his wife's keychain (to which was attached a safety pin, an animal tooth and a heart medallion), about \$30 and a "penny" which he said was a "Chinese coin". (The coin was, in fact, Mexican). Mr. Thomas identified the pistol taken from defendant as the one defendant used, the keys and the photograph of the keys taken from defendant as the ones defendant took and the foreign coin in defendant's possession at the time of his arrest. He found the foreign coin about a year earlier and was told upon inquiry at a bank that it was "worth nothing but a penny".

A police officer testified for the State that after receiving the radio call of the armed robbery he picked up the defendant whom he saw in a telephone booth at the train station, removed the pistol from him, took him to the police station and there removed from the defendant U.S. currency, the keychain and the foreign coin.

Defendant testified that he had never seen Mr. Thomas before; that the coin was his; that his pistol was one he used for protection, and denied ever having seen the keyring. No witness corroborated defendant's account of his activities of the day of the robbery and of the evening, even though he had testified to his association with numerous people on that day.

We find no merit in defendant's contention that he was not proven guilty beyond a reasonable doubt. He was positively identified by Mr. Thomas who had ample opportunity to see him in bright light. Positive and credible testimony by one witness is sufficient to convict even if contradicted by the accused.

(People v. Novotny (1968), 41 Ill. 2d 401, 411-412.) The articles in defendant's possession at the time of his arrest were identified

by Mr. Thomas, the victim, including the pistol used during the attack, the keyring and the Mexican coin taken from Mr. Thomas by defendant. Defendant's possession of a pistol (identified by the victim as the one used by defendant) and of the victim's property at the time of his arrest (the keychain and coin) were important factors which were undoubtedly taken into account by the jury. The reviewing court may not substitute its judgment on the weight of disputed evidence for that of the trier of fact--here, the jury. (People v. Novotny, supra, at p. 412; People v. Nicholls (1969), 42 Ill. 2d 91, 95. See also, People v. Taylor (1972), 8 Ill. App. 3d 727, 730-731, and People v. Slayton (1974), 16 Ill. App. 3d 910, 913.) The key-chain and coin were properly received in evidence. The victim recognized both as his own and as stated above identified them. See, People v. McElroy (1964), 30 Ill. 2d 286, 290 and People v. Oliver (1970), 129 Ill. App. 2d 83, 90.

Next, the defendant contends that the trial court erred in convicting the defendant of two offenses arising from a single transaction. The jury returned a verdict of guilty on both the charge of armed robbery and robbery. While the trial judge in imposing the 10 to 30 year sentence during the hearing in aggravation and mitigation stated that the only thing the defendant was sentenced on was "on the robbery count", there is no doubt, from our examination of the entire record, that the sentence imposed was for armed robbery. The court commented at that hearing that the defendant was ineligible for probation because he was sentenced for armed robbery and noted that the penalties were the same for that offense in the then pending Unified Code of Corrections and in the effective law at the time of sentencing. Moreover, the trial court later entered an amended order indicating clearly that the sentence was for the charge of armed robbery alone, and an

amended mittimus was issued accordingly.

However, the offenses of armed robbery and robbery, of which the jury found the defendant guilty, did arise out of the same transaction. Under Supreme Court Rule 366 (Ill. Rev. Stat. 1971, ch. 110A, par. 366) this incomplete conviction of the defendant on the robbery charge, which is the less serious offense, may be vacated. People v. Lilly (1974), 56 Ill. 2d 493, 496. See also, People v. Fricks (No. 72-385, 1974), ____ Ill. App. 3d ____.

Therefore, the conviction for armed robbery and the sentence of not less than 10 years nor more than 30 years is affirmed. The conviction for robbery is reversed.

Affirmed in part and reversed in part.

GUILD and SEIDENFELD, JJ., concur.

1 22 I.A. 94³⁰

73-53

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Acting Presiding Justice
 Honorable WILLIAM L. GUILD, Justice
 Honorable L.L. RECHENWACHER, Justice
 LOREN J. STROTE , Clerk Pro Tem
 JOSEPH C. DORING, Sheriff

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September 19, 1974 the Opinion of the Court was filed in
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IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

FILED

SEP 19 1974

PEOPLE OF THE STATE OF ILLINOIS;
Plaintiff-Appellee,

y.

JAMES R. COOK,

Defendant-Appellant.

LOREN J. STROTZ, Clerk pro tem
Appellate Court, 2nd District

) Appeal from the Circuit
) Court of the 18th Judicial
) Circuit, Lake County,
) Illinois.

MR. JUSTICE RECHENMACHER delivered the opinion of the court;

This is an appeal from a judgment of the Circuit Court of Lake County revoking the defendant's probation and sentencing him to a term of not less than two nor more than eight years in the state penitentiary.

The defendant was originally charged with the offense of burglary, pleaded guilty and was placed on probation for five years, with the stipulation that he reside in Halfway House in Lake County during his probationary period. At a hearing on July 21, 1971, the State was granted leave to file a petition to revoke the defendant's probation because of his unauthorized absence from Halfway House. His probation was then amended, placing him on the Work Release program at the Lake County jail until further notice by the court. On August 9, 1972, defendant's probation was amended requiring him to serve six months in the County Jail on the Work Release program. On August 28, 1972, a petition to revoke defendant's probation was again filed, charging the

defendant with abandonment of the Work Release program and failure to return to the Lake County jail on August 26, 1972.

At the hearing on the petition to revoke his probation the defendant took the stand before the State had put on any testimony and in response to questions by his counsel, the Public Defender, he stated that he failed to return to the jail from his work program on August 26, 1972, and was absent from the jail without permission until he was apprehended on September 1. This testimony was later verified by his answers to questions put to him on cross-examination by the State's Attorney. The defendant, prior to making the said admission, was not admonished in any way by the court as to his statement or the consequences of a revocation of his probation.

It is contended by the defendant that he was denied due process of law when the court failed to admonish him as to his rights prior to the admission of his violation of probation. The defendant also claims there was a violation of due process when the court allowed the defendant to testify first since this tended to wrongfully shift the burden of proof to the defendant.

The defendant maintains that he is entitled to the protection of Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402) as to admonishments prior to a plea of guilty, inasmuch as due process requires this protection at a hearing to revoke probation just as in an original proceeding under indictment or information. In support of this contention the defendant invokes the general language of

People v. Pier (1972), 51 Ill. 2d 96, where at p. 100 the court said, in speaking of the rights of a defendant charged with having violated his probation:

"Justice demands that he also be entitled to the protection of the same due-process requirements which pertain to pleas of guilty when he waives his right to a judicial determination of the charge that he violated his probation and confesses or admits the charges of the revocation petition."

The above quoted language would be persuasive if it ended there, but Pier was not decided on the issue of insufficient admonishment but rather on a question of involuntariness due to the failure of the State to live up to an obligation under a plea bargain. The court (in Pier) in the sentence immediately following the language quoted above so indicated by saying:

"If he does so [i.e. pleads guilty] in reliance upon an unfulfilled promise by the State's Attorney, then his confession or admission of the charge is not voluntary for the same reason that a plea of guilty entered in reliance upon an unfulfilled promise of the State's Attorney is not voluntary."

The special circumstances alluded to in the latter quotation from Pier certainly qualify the effect of the general language immediately preceding.

While it is true that the Fourth Appellate District in People v. Bryan (1972), 5 Ill. App. 3d 1006, and People v. Watkins (1973), 10 Ill. App. 3d 875, took the view that Supreme Court Rule 402 applies to a hearing for revocation of probation, this view is plainly at odds with the First District cases of People v. Collins (1973), 14 Ill. App. 3d 446, and People v. Beard (1973), 15 Ill. App. 3d 663, and the decision of this court in People v. Evans (1972), 3 Ill. App. 3d 435. Moreover, the United States Supreme Court did not adopt this view of a revocation

hearing in the recent case of Gagnon v. Scarpelli (1973), 36 L. Ed. 2d 656, 666. In that case the defendant's probation was revoked without affording either a hearing or counsel. While the court agreed that due process was not followed in revoking defendant's probation without a hearing and in the absence of a hearing no question as to admonishment arose, the court held:

" . . . we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime."

In the course of its opinion the court set forth the elements it felt were essential to due process in a revocation of probation hearing, as being, p. 664:

" (a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole."

While the main issue in Gagnon was whether a hearing for revocation of parole or probation required the presence of counsel for the defendant, it is noteworthy that admonishment by the court prior to a plea of guilty is not there set forth as a requirement of due process in a revocation hearing.

The requirements of due process as set forth above in Gagnon were fully complied with in the present case. The

defendant was notified in writing by the Petition to Revoke as to the grounds for revocation; he was present in open court to hear the evidence, with opportunity to be heard in person, and with the right to confront adverse witnesses and cross-examine them, and a neutral factfinder in the person of the court. The judge's remarks summarizing his decision are part of the record. Moreover, the defendant had the benefit of counsel in the person of the Public Defender and from a review of the total record it is evident that the defendant was acting voluntarily in all respects. We feel, therefore, that his rights were adequately safeguarded, and as between the viewpoint set forth in the Fourth District cases of Bryan and Watkins and that indicated by the First District in Beard and Collins, we are inclined to the latter view.

In any event, as pointed out in the Gagnon case, there are essential differences between a plea of guilty to a criminal charge on indictment or information and an admission of facts at a revocation hearing which are a basis for revoking probation. The plea of "guilty" on arraignment immediately forfeits rights which until it is made are inviolate as a personal safeguard. As to a particular criminal charge, once a plea of guilty is knowingly and intelligently entered, there is a loss of certain rights--to proceed by indictment, to be tried by jury, and the considerable consequences that a guilty plea merges in it, deprivation of due process occurring before the plea--these are all fundamental consequences of a guilty plea. It is not surprising that a guilty plea to a criminal charge must therefore be hedged about with restraints and qualifications not considered essential in a revocation hearing.

While loss of liberty is equally to be dreaded whether by criminal sentence or by revocation of probation, in the one case the right to liberty has already been impaired, it is no longer inviolate.

There remains the question of whether the defendant was prejudiced when the court allowed him to proceed first and testify without the State having presented its case. There is no question, of course, but that the burden of proof remains at all times with the State and it is the State's obligation to go forward with the evidence, so it is undeniable that the course of the hearing in this case was to some extent short circuited. However, the real question is, was the defendant prejudiced by this procedure? It appears from the record of the testimony at the hearing that he was not at all prejudiced. Upon being cross-examined by the State's Attorney, he unequivocally and clearly admitted the facts previously stated during direct examination by his own counsel and from subsequent testimony of the deputy sheriff it is certain that the defendant was absent from the jail without leave. No defense to the charge of violation of probation appeared to be possible under the circumstances but if there were mitigating circumstances, they could have been brought out on redirect examination. We fail to see where the defendant was materially prejudiced. It was his own counsel who elicited the admission from him that he failed to return to the jail as required by the terms of his probation. It appears from all of the evidence that the result would have been the same whether he testified or not.

We find no error in the record requiring reversal and the judgment of the Circuit Court of Lake County is affirmed.

Judgment affirmed.

GUILD, J. concurs.

SEIDENFELD, J. specially concurring.

I concur in the result but do not fully agree with the reasoning which leads the majority to that result.

In the case we have before us, the defendant volunteered, while he was on the witness stand testifying in his probation revocation hearing, that he committed the violation of his probation charged in the petition. Strictly speaking, the defendant did not waive his right to require the State to prove the violation by a preponderance of the evidence. The admission was spontaneously made in answer to a question by defendant's own counsel; it was verified by defendant's answer to the prosecutor during cross-examination. Rather than constituting a waiver, the defendant's statement was a spontaneous admission which could not be characterized as involuntary in any sense. It is somewhat akin to a spontaneously volunteered statement made to police officers which similarly does not require admonishment of constitutional rights. (Cf. People v. Baer (1974), 19 Ill.App.3d 346, 348.)

Gagnon v. Scarpelli (1973), 36 L Ed 2d 656, did not deal with a waiver of the due process rights that it enunciated an accused is entitled to in a probation revocation hearing. Gagnon ruled on the procedural due process rights which should be accorded a defendant who seeks to contest the revocation of his probation. I agree that the nature of the contested hearing here did not offend due process. I would, however, conclude that since defendant was not in the position of waiving his right to a judicial determination of the revocation charge against him, there is no occasion to express an opinion on the issue of whether the requirements of People v. Pier (1972), 51 Ill.2d 96, have been satisfied.

74 99
73-154

OPLE VS. EDWARD CAVETT

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-four, within and for the Third District
of Illinois:

Present—

HONORABLE ALLAN L. STODER, Justice

HONORABLE JAY J. ALLOY,

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
September 19, 1974 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

No. 73-154
and
No. 74-99

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	McDonough County
vs.)	
)	
EDWARD CAVETT,	)	Honorable
	)	U. S. Collins
Defendant-Appellant.	)	Presiding Judge

Mr. JUSTICE ALLOY delivered the opinion of the Court:

Abstract

Defendant Edward Cavett appeals from a judgment of the Circuit Court of McDonough County in which he was found guilty of the offense of receiving stolen property having a value in excess of \$150 and was sentenced to a term of from 2 to 6 years in the State Penitentiary. The judgment of guilt followed a plea of guilty by defendant and after plea negotiations in which the prosecutor agreed that he would recommend a sentence of 1 to 2 years if probation was denied.

On appeal, defendant asserts that the trial court failed to comply with Supreme Court Rule 402 (Illinois Revised Statutes, 1973, ch. 110A §402) and notably with Rule 402(a)(1) in failing to inform defendant of the nature of the charge and to determine that he understood it. He also contends that the trial court failed to ascertain that there was a factual basis for the charges as required in Rule 402(c) and, additionally, that after the trial court had conditionally concurred in the plea agreement, the trial court failed to allow defendant to change his plea before imposing a sentence greater than that contemplated by the agreement in violation of Rule 402(d)(2).

We have frequently said that while it is true that Rule 402 requires only substantial compliance, the Supreme and Appellate Courts have required that

a sufficient record be made so that the guilty plea is entered knowingly, intelligently and voluntarily, and that such objective is attained when the trial court substantially complies with the Rule.

Our courts have indicated that a defendant must be advised of the nature of the charge. The record in this cause shows, that, at the hearing in which defendant entered his guilty plea, the trial court did not ask defendant if he knew he was charged with a crime, much less what type of crime he was charged with. Even in his prior court appearances in this case, so far as shown by the record, there was no mention made of the type of crime charged. We could find no evidence that the trial court ascertained that defendant had a copy of the indictment or that he understood it. On the basis of the record, therefore, we must conclude that the trial court failed to adequately inform the defendant of the nature of the charge and to determine that he understood it as required by Rule 402(a)(1).

The supplementary assertions that the record does not show enough to establish the ascertainment of a factual basis for the charge of receiving stolen property, as well as the additional contention that the trial court conditionally concurred in the plea agreement, need not be discussed in view of the fact that we are required to remand this cause to the Circuit Court of McDonough County by reason of the failure of the trial court to inform defendant of the nature of the charge as indicated.

This cause will, therefore, be reversed and remanded to the Circuit Court of McDonough County with directions to the trial court to permit defendant to withdraw his guilty plea, if he so desires, and plead anew in this cause. The judgment of the Circuit Court of McDonough County is, therefore, reversed and this cause is remanded for further proceeding in accordance with the views expressed in this opinion.

Reversed and Remanded
With Directions.

Stouder and Dixon, JJ. concur.

74-243

People vs. Ronnie Williams

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-four, within and for the Third District
of Illinois:

Present— PC

HONORABLE ALBERT SCOTT, Presiding Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE JAY J. ALLOY, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
September 19, 1974 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1974.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Peoria County.
)	
vs.)	
	)	Honorable
RONNIE WILLIAMS,	)	Richard Eagleton
	)	Presiding Judge.
Defendant-Appellant.)	

PER CURIAM

Abstract

This is an appeal from a judgment of the Circuit Court of Peoria County in which defendant Ronnie Williams was convicted of aggravated battery following a plea of guilty and was sentenced, pursuant to plea negotiations, to a term of from one to five years in the penitentiary. The State Appellate Defender was appointed to represent defendant in the appeal in this Court. Such Appellate Defender has now moved for leave to withdraw as counsel on appeal in accordance with the precedent in Anders v. California, 386 U.S. 738. The Appellate Defender states in his motion that a careful examination of the record supports his conclusion that an appeal would be wholly frivolous and could not possibly be successful in this case. The motion for leave to withdraw was accompanied by a brief in support of counsel's conclusion.

It appears from the record that on May 8, 1973, defendant filed a petition for a Post-Conviction Hearing in the Circuit Court of Peoria County with respect to the conviction of defendant on February 9, 1972, in such court, to which we have

referred. On December 12, 1973, following a hearing at which defendant was represented by court-appointed counsel, the defendant's petition was denied on the merits.

It was alleged in defendant's petition that he was denied equal protection of the laws by being tried as an adult when he was only seventeen (17) years of age at the time of the commission of the offense for which he was later convicted. As a basis for such claim, defendant Williams contended that Section 2-7(1) of the Juvenile Court Act of 1965 (See: Illinois Revised Statutes, 1971, ch. 37 §702-7(1)) was invalid. The Act provided that no boy under the age of seventeen years or girl under the age of eighteen years could be prosecuted under the criminal laws of Illinois (with stated exceptions) and such Act was alleged to be sexually discriminatory. In the proceeding in the Circuit Court on the Post-Conviction petition, the State of Illinois filed a motion to dismiss in which it was asserted that the issue which Williams raised was considered in People v. Pardo, 47 Ill. 2d 420, 265 N.E. 2d 656 (1970), which then upheld the constitutionality of Section 2-7(1). The trial court, following a hearing during which the arguments of counsel were heard, denied the Petition on the merits and cited People v. McCalvin, 55 Ill. 2d 161, 302 N.E. 2d 342 (1973) and People v. McCabe, 15 Ill. App. 3d 169, 303 N.E. 2d 469 (3rd Dist., 1973), both of which upheld the constitutionality of the section.

The Illinois Supreme Court recently considered the identical issue raised by Williams in his Petition and found that Section 2-7(1) of the Juvenile Court Act, which was challenged by defendant Williams, was violative of Article I, Section 18 of the Illinois Constitution of 1970, which prohibits sexual discrimination by the State, and was therefore invalid. People v. Ellis, 57 Ill. 2d 127, 311 N.E. 2d 98 (1974).

It is notable, however, that the Supreme Court concluded "... that the effect of the deletion of the invalid classification from the statute is to render the statute applicable to both males and females who were not 'under the age of 17 years', and that the failure to consider (the seventeen-year-old) defendant eligible for

treatment as a minor under its provisions did not deprive him of equal protection of the laws." 57 Ill. 2d at 134, 311 N.E. 2d at 102.

Since Williams is in the same situation as was defendant Ellis in the case referred to, the Williams petition is without merit.

On the basis of the record in this cause, therefore, we concur in defense counsel's conclusion that there was no basis for maintaining an appeal in this cause and that the continuation of the appeal would be wholly frivolous and could not possibly succeed. The judgment of the Circuit Court of Peoria County is, therefore, affirmed and the motion of the State Appellate Defender to withdraw as counsel for defendant Ronnie Williams is allowed.

Judgment Affirmed and
Withdrawal Motion Allowed.

No. 72-342

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
SEP 13 1974
CLERK OF COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Madison County.
)	
vs.)	
)	
GRIFFIN W. HOWARD,	)	Honorable John Gitchoff,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

The defendant was indicted for the offense of indecent liberties with a child and pled guilty to that charge. The State Appellate Defender was appointed counsel on appeal.

The Appellate Defender has filed a motion pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 493, alleging that there is no merit to the appeal and requesting leave to withdraw as counsel. The defendant has been given proper notice and granted an extension of time in which to file documents supporting his appeal; he has failed to respond.

We have inspected the record and have found no potential ground for appeal. The indictment was properly framed and the record demonstrates sufficient compliance with the requirements of Supreme Court Rule 402 in the acceptance of the guilty plea.

Motion to withdraw allowed; judgment affirmed.

PUBLISH ABSTRACT ONLY.

Justice Carter not participating.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
SEP 5 1974
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	Appeal from the Circuit Court of the
Plaintiff-Appellee,	)	First Judicial Circuit,
	)	Williamson County.
vs.)	
)	
DELTA K. GROVES,	)	Honorable Dorothy Spomer,
	)	Judge Presiding.
Defendant-Appellant.)	

Mr. PRESIDING JUSTICE G. MORAN delivered the opinion of the court:

Defendant appeals from a judgment of the circuit court of Williamson County revoking her probation and sentencing her to a minimum of one year and a maximum of three years in the penitentiary for the offense of reckless homicide.

Defendant does not contend that the trial court erred in revoking her probation but contends only that the maximum sentence imposed is excessive.

Defendant pled guilty to the offense of reckless homicide and was sentenced to a period of two years of probation pursuant to a plea agreement.

Several months later the State filed a petition to revoke her probation which alleged that she had been convicted of the offense of driving under the influence of intoxicating liquor and driving with a suspended driver's license. She served thirty days in jail for that offense.

Defendant argues that the trial court gave undue consideration to the defendant's later criminal conduct in imposing the maximum sentence.

In the revocation of probation, two factors must be considered before sentence is imposed: first, the nature of the act which lead to the revocation, and second, the nature of the offense of which the probationer was originally convicted.

The first factor is relevant in determining whether probation should be revoked; the second is relevant to the punishment to be imposed if probation is revoked.

In *People v. Lillie* 79 Ill.App.2d 174, 223 NE2d 716, at 719, this court stated,

"The purposes sought to be achieved by the imposition of sentence are adequate punishment for the offense committed, the safeguarding of society from further offenses, and the rehabilitation of the offender into a useful member of society. Adequacy of the punishment should determine the minimum sentence, with the maximum dependent upon the court's divination as to the length of time required to achieve rehabilitation. 79 Ill.App.2d 174."

Reckless homicide is a class four felony (Ill.Rev. Stat. ch. 38, par. 9-3(d)), carrying a possible sentence of from one to three years. (Ill.Rev.Stat. ch.38, par. 1005-8-1 (b)(5)).

On the record before us we are unable to say that the trial court placed undue emphasis on defendant's later contention in imposing sentence. In fact the spread of from one to three years in sentence gives the parole authorities an ideal time to supervise the defendant's rehabilitation.

For the foregoing reasons the judgment of the trial court is affirmed.

PUBLISH ABSTRACT ONLY

CONCUR: EDWARD C. EBERSPACHER, J.,
RICHARD T. CARTER, J.

No. 73-417

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
SEP 13 1974

W. R. Farmer
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Respondent-Appellee,	)	Appeal from the Circuit Court of
	)	St. Clair County.
s.)	
)	
LYLDE JOHNSON,	)	Honorable Harold O. Farmer,
	)	Judge Presiding.
Petitioner-Appellant.)	

PER CURIAM:

The petitioner was convicted of two counts of the offense of armed robbery in St. Clair County in April, 1971. He was sentenced to two concurrent terms of eight to twenty years in the penitentiary. On August 4, 1972, this Court affirmed the petitioner's conviction (People v. Johnson, 6 Ill.App.3d 1003, 286 N.E.2d 380).

On February 23, 1973, the petitioner filed a pro se petition for habeas corpus in the circuit court of St. Clair County. Counsel was appointed to represent the petitioner and, after argument on the merits of the petition, the People's motion to dismiss was granted. Petitioner appeals from that decision.

The State Appellate Defender, appointed as counsel on appeal, has filed a motion and memorandum pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1369, 18 L.Ed.2d 493, alleging that there is no merit to the appeal and requesting leave to withdraw. The petitioner has been given proper notice of the motion and granted an extension of time in which to file documents supporting his appeal; he has failed to respond.

We have examined the record and have found no jurisdictional or constitutional defect in the indictment or elsewhere in the proceedings, and no showing of any subsequent happening which would entitle the petitioner to the relief sought.

Motion to withdraw allowed; judgment affirmed.

PUBLISH ABSTRACT ONLY.

Justice Carter not participating.

30
22 I.A. 247

No. 74-45

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
SEP 12 1974

Walter J. ...
FIFTH DISTRICT OF ILLINOIS

VICTORIAN INNS, INC.,	:	Appeal from the Circuit Court of
Plaintiff-Appellant,	:	Alexander County, Illinois.
vs.	:	
JOHN R. BENDA, d/b/a TOWN &	:	Honorable M. P. O'Shea,
COUNTRY MOTEL,	:	Presiding Judge.
Defendant-Appellee.	:	

MR. JUSTICE EBERSPACHER delivered the opinion of the court:

This is an appeal from a judgment entered by the circuit court of Alexander County, granting the defendant's motion for judgment at the conclusion of plaintiff's case, tried to the court.

Plaintiff, Victoria Inns, Inc., in October, 1972 sold to the defendant, John R. Benda doing business as Town and Country Motel, 20 rooms of used motel furniture at \$200 per room, or a total of \$4000. By the terms of the agreement the defendant was to pay in cash as each quantity of rooms was picked up by him. The evidence shows that each "room" of furniture consisted of two sets of box springs and mattresses, two bed frames, two lounge chairs, one wedge table, one long headboard, one desk and chair, one luggage rack, one large and one small lamp, and one roll of carpet. Plaintiff did not reserve title to the furniture or any security interest therein.

In four or five separate trips prior to December 6, 1972, defendant picked up all of the furniture except the lamps and placed it in the rooms of his motel. By various payments he paid a total of \$2800 and does not deny that he is indebted to plaintiff in the amount of \$1200. In the last week in February, 1973 plaintiff contacted the defendant with reference to the balance due of \$1200, at which time

defendant promised to pay the balance by March 6, and plaintiff presented defendant with a statement or invoice in the following form:

"Payable to: Victorian Inns, Inc., Post Office Box 603, Cape Girardeau, Missouri 63701.

Date: December 6, 1972.

Mr. John Banda

Address: Town and Country Motel, East Cape, Illinois.

Description: Balance due on twenty (20) rooms of furniture purchased from Holiday Inn.

Amount: \$1,200.00.

Mr. Banda: Please be sure to make your check payable to VICTORIAN INNS, INC. -- for this billing.

These statements will be paid no later than Tues.
3/6/73 or furniture will be picked up.

John R. Banda"

With the exception of that part italicized it was typed; the last paragraph was written by plaintiff's agent after defendant had agreed to pay the balance on March 6 and the signature was that of defendant, although the defendant by his answer alleged that the last paragraph was not handwritten on it at the time he signed it. A copy of the statement or invoice was attached to the complaint in this cause, but it was not introduced into evidence. There is no evidence that any consideration was paid or promised for it. The instrument obviously did not pass title to plaintiff.

On March 30, 1973 an agent of plaintiff served upon a woman who represented that she was a restaurant manager and in charge of defendant's motel property in his absence, a written demand addressed to defendant "for the return of seven (7) rooms of furniture which you agreed in writing would be paid for no later than March 6, 1973, or in lieu thereof, would be returned to the undersigned."

Thereafter plaintiff filed its complaint alleging that defendant had in his possession at his motel, property of plaintiff consisting "of seven (7) rooms of motel furniture, each room containing a table, three (3) chairs, dresser, mirror, table lamp and bed." The complaint further alleged the demand above referred to, and

refused to return or allow plaintiff to pick up the furniture and pled the statement or invoice. Plaintiff alleged damage in the amount of \$5000 for wrongful detention and injury and damage to the property and demanded judgments for "the recovery of possession of said goods and chattels and \$5000 damages for their detention."

Thereafter the defendant filed his motion to dismiss and motion to strike. The motion to dismiss was based upon the plaintiff's failure to file a cost bond as the plaintiff was not a resident of the State of Illinois. The plaintiff posted bond and the motion was apparently not heard. The defendant's motion to strike was heard and denied; a part of the basis of the motion to strike was that the complaint was a hybrid complaint and that the plaintiff had not complied with the applicable sections of the Uniform Commercial Code. The defendant subsequently filed his answer denying the allegations of the plaintiff's complaint and setting forth the affirmative defense that the plaintiff's invoice dated December 6, 1972 was not a true and correct copy of the invoice that the defendant signed. The defendant asserted that those writings "are not in the handwriting of Defendant and were not on said invoice at the time he signed same, and said words were written on said invoice without the knowledge, consent or authority of Defendant."

The issue is whether the plaintiff is entitled to the relief sought. The defendant does not deny owing the plaintiff for the furniture. The plaintiff has not, however, sued for the money due. The plaintiff instead brought this action for "judgment against Defendant for the recovery of possession of said goods and chattels, and \$5,000.00 damages for this detention." The evidence also showed that the sale was an outright sale with no attempt by the plaintiff to reserve any security interest or conclude the agreement by some conditional sale contract or variations thereon. What the plaintiff urges is that the handwritten words on the invoice give him the right to possession of seven rooms of furniture out of the 20 obtained by the defendant. The discrepancy between seven rooms of furniture claimed and the \$1200 demanded is not explained. Furthermore, there is not sufficient evidence in the record from which monetary damages, as claimed, could be determined.

The plaintiff has urged that the trial court erred in granting the defendant's motion for dismissal and refusal to grant it a new trial. The plaintiff contends that the handwritten "agreement" between the parties as allegedly set forth on the invoice specifying that the goods would either be paid for by a certain date or "picked up" gives the plaintiff a right to possession when the payment was not made as of the specified date.

Plaintiff, by its counsel, advised the court in its opening statement, that "this is an action for claim and delivery which is a common law origin of the replevin actions" and the elements "are much the same as replevin except of course that no bond is required nor affidavit and the property remains in the hands of the defendant." The case was obviously presented on that basis and at no place in the record is the detinue mentioned. The plaintiff would now label the cause of action as one in "Detinue." This action has been defined in 66 Am.Jur.2d Replevin §160 as, "a possessory action having for its object the recovery of specific personal property and damages for its detention. At common law an action of detinue would be for the recovery of specific personal property unlawfully detained, or its value, and for damages for its detention." (emphasis ours)

As stated in Gary Acceptance Corp. v. Napilillo, 86 Ill.App.2d 257, 261, 230 N.E.2d 73:

"The gist of an action in detinue is that the Defendant is wrongfully in possession of personal property which belongs to the Plaintiff. There is nothing to show that the finance company had any interest in the personal property located in the Defendant's home. Plaintiff's claim against Defendant was a personal debt. * * *" (emphasis ours)

A case cannot be tried on one theory in the trial court and on another in the reviewing court. (Chicago T. & T. Co. v. De Lasaux, 336 Ill. 522, 529; Nielsen v. Duyvejonck, 94 Ill.App. 2d 224, 230; Blanchard v. Lewis, 414 Ill. 515, 521.) Plaintiff admits that the statutory requirements for maintaining a replevin action were not followed.

It is clear that title to the goods in question passed upon the sale in

October, 1972. It is not clear that even with the pleadings and evidence being construed most favorably for the plaintiff that they are sufficient to give any possessory interest in the goods to the plaintiff. Therefore, "A judgment, however, may be sustained by any argument and on any basis appearing in the record which demonstrates that the judgment was correct, even though such objection or argument had not been advanced in the trial court." (Perlman v. 1st National Bank of Chicago, 15 Ill.App.3d 784, 793, 305 N.E.2d 236.) There is adequate evidence and law to support the judgment of the trial court.

The judgment is affirmed.

CREBS and CARTER, JJ, concur.

PUBLISH ABSTRACT ONLY

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22 I.A. 325

73-44

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice

Honorable GLENN K. SEIDENFELD, Justice

Honorable L. L. RECHENMACHER, Justice

LOREN J. STROTZ , Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

October 4, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

FILED

SEP 4 - 1973

LOREN J. SMITH, Clerk pro tem
Appellate Court, 2nd District

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

ROBERT JAMES BAUER, a minor)
by his next friend, Robert J.)
Bauer, Jr., et al.,)
)
Plaintiffs-Appellants,)
v.)
BOARD OF EDUCATION OF SCHOOL)
DISTRICT NO. 109, LAKE COUNTY,)
State of Illinois, et al.,)
)
Defendants-Appellees.)

Appeal from the Circuit
Court for the Nineteenth
Judicial Circuit, Lake
County, Illinois.

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Plaintiffs appeal from a dismissal of Counts 1 through 27 of their second-amended complaint. Counts 28 and 29 were answered and the court found no just reason for delaying the enforcement or appeal of the order dismissing the first 27 counts. Ill.Rev. Stat. 1973, ch. 110A, par. 304.

Plaintiffs' complaint stems from a number of incidents primarily between the principal of Maplewood Elementary School, Robert Kerr, and the minor plaintiff, Robert James Bauer, the minor plaintiff's parents, Mr. and Mrs. Robert J. Bauer, Jr., and eventually the plaintiffs' attorney, Paul Hamer. Other party defendants were the Board of Education of School District No. 109, Lake County, and William Fenelon, superintendent of schools for district No. 109.

On appeal, plaintiffs claim that their dismissed counts stated causes of action, that there was no improper joinder of causes of

action or parties in their complaint, that the court erred in denying amendment of the complaint, and that plaintiffs are denied a remedy in contravention of article I, section 12 of the 1970 Illinois Constitution. Defendants respond by arguing that plaintiffs' various counts failed to state causes of action either substantively or by reason of the various immunities provided by the Tort Immunity Act (Ill.Rev.Stat. 1973, ch. 85, par. 1-101 et seq.) and the School Code (Ill.Rev.Stat. 1973, ch. 122, par. 821 et seq.); that plaintiffs' second-amended complaint was multifarious; and that the trial court did not err in refusing leave to file a third-amended complaint.

Plaintiffs' second-amended complaint, filed July 13, 1972, contains allegations of essentially six occurrences or groups of occurrences from which the 29 counts are derived.

Counts 1-6, brought on behalf of the minor plaintiff by his father as next friend, alleged the beating of the minor plaintiff, a 4th grader at Maplewood, by defendant Principal Robert Kerr, during school hours while the plaintiff was attending school on January 22, 1971. The defendants in Counts 1-4 are the Board and the Principal as an employee of the Board; and in Counts 5 and 6, Kerr is sued individually as the sole defendant.

Count 1 alleges the duty of the Board of Education of School District No. 109 to indemnify its employees pursuant to section 10-20.20 of the School Code (Ill.Rev.Stat. 1973, ch. 122, par. 10-20.20); that the Board knew or should have known Kerr was prone to using violence; that notice was given as required by the School Code; and that plaintiff was free from contributory negligence. Count 1 requests compensatory damages only.

Count 2 is essentially the same as Count 1 except it alleges the acts of Kerr were deliberate, willful and malicious, and requests only punitive damages.

Count 3 is essentially the same as Count 2 except that it states it is brought under the Tort Immunity Act instead of the School Code. Only punitive damages are requested.

Count 4 is identical to Count 1 except that it is brought under the Tort Immunity Act and specifically alleges the Board has waived immunity for damages caused by ordinary negligence to the extent of its insurance coverage by reason of section 9-103(b) of the Tort Immunity Act. Compensatory damages only are requested.

Count 5 is against Kerr individually alleging the beating as in Count 1 and states the acts were willful and malicious entitling plaintiff to punitive damages. The Count purports to be brought under the common law.

Count 6 is also against Kerr individually under common law. It deletes reference to willfulness and requests compensatory damages only.

Counts 7 through 12 relate to an incident alleged to have occurred on March 10, 1971, at 3:00 P.M. at Maplewood. Kerr allegedly refused to allow the minor plaintiff to leave his office for 3 hours after school and refused to allow the plaintiff to call home, which acts were alleged to be unlawful and against the minor plaintiff's will.

Count 7 added the allegation that Kerr was prone to violence, which the Board knew or should have known; alleged "humiliation, embarrassment, fright, headaches, upset stomach and nervousness" as damages; alleged that plaintiff was not contributorily negligent; and alleged that the action was brought under the notice and indemnity provisions of the School Code.

Count 8 is similar except it alleges the acts were deliberate, willful and malicious and requests punitive damages only.

Count 9 is essentially the same as Count 8 except it is brought under the Tort Immunity Act and alleges Kerr's acts were not in the enforcement or execution of any law.

Count 10 requests compensatory damages alleging the Board's insurance waived its Tort Immunity Act immunities.

Count 11 is against Kerr individually under the common law and requests punitive damages for his deliberate and malicious conduct.

Count 12 is against Kerr individually under the common law requesting only compensatory damages.

Counts 13-18 concern treatment of the minor plaintiff by Kerr from March 11th through March 16, 1971, wherein it is alleged that plaintiff was removed from his regular classroom; not given assignments but just told to read; was not allowed to participate in physical education (a required subject); was exposed to the cold and winds from outside; and was exposed to certain other humiliations and opprobrious language about himself and parents, all of which required the plaintiff's parents to remove the plaintiff from school and provide a private education for him. This course of conduct was characterized in the complaint as cruel and unusual punishment, an invasion of privacy and a cause of grievous mental pain. The Superintendent of Schools of School District No. 109, William Fenelon, alleged to have originated and approved this "special education" program, was also made a defendant.

Specifically, Count 13 alleged the Board knew or should have known that defendants Kerr and Fenelon conducted such "special education" programs in the past; that the negligence of Kerr and Fenelon was the proximate cause of damage to the minor plaintiff and plaintiff was free from contributory negligence. The action was brought pursuant to the indemnity and notice provision of the School Code and requested only compensatory damages.

Count 14 is essentially the same as Count 13 except no reference to mental suffering was made and no negligence was alleged. The acts alleged were characterized as deliberate, willful and malicious, and punitive as opposed to compensatory damages were requested.

Count 15 is the same as Count 14 except it was brought under the Tort Immunity Act and alleges Fenelon and Kerr were not in the execution or enforcement of any law.

Count 16 is the same as Count 13 except it was brought under the Tort Immunity Act and alleges a waiver of immunity for ordinary negligence because of liability insurance coverage.

Counts 17 and 18 are against Kerr and Fenelon individually, requesting punitive and compensatory damages respectively.

Counts 19-22 relate to an alleged incident occurring on the morning of September 7, 1971, at the principal's office. There Kerr in the presence of plaintiff's teacher allegedly threatened to punch the plaintiff; called him a professional liar, and (with a copy of the original complaint in his hand) called Hamer a "stupid and dumb attorney, who sues everyone, even the Park District over the use of the tennis courts".

Count 19 alleges numerous mental or emotional damages to the plaintiff; that the Board knew or should have known of Kerr's uncontrollable temper; that Kerr was not in the execution of any law; that the acts were willful and malicious. Plaintiff requested an injunction against intimidation by Kerr in the future; and requests punitive and compensatory damages.

Count 20 sounds in slander against the Board and Kerr or alternatively against Kerr individually, and requests punitive damages.

Counts 21 and 22 are brought by Hamer for slander. Count 21 purports to request special damages; and Count 22 requests exemplary damages.

Counts 23 and 24 brought by the minor plaintiff's parents relate to allegedly slanderous remarks made by Kerr on March 11, 1971, in the presence of Robert James Bauer and William Bauer (a brother) about their parents. Kerr then allegedly sprayed an aerosol stating that he could not stand the smell of the children.

Count 23 purports to request special damages; Count 24 requests punitive damages. The Counts are brought against the Board and Kerr, as its employee, jointly, or in the alternative, against Kerr individually.

Counts 25-27, brought by the parents of the minor plaintiff against the Board and Kerr jointly or in the alternative Kerr individually, allege that several letters written by Kerr on January 25, 1971, January 26, 1971, and March 5, 1971, to the plaintiffs and circulated to others, constituted an invasion of privacy and libel. Count 25 alleges waiver of immunity by insurance coverage and requests compensatory damages; Count 26 requests punitive damages; and Count 27 for libel also requests punitive damages and additionally alleges the Board's duty to indemnify under the School Code.

Counts 28 and 29 are not on appeal. Count 28 requests an injunction requiring the promulgation of visitation rules, prohibiting defendants from interfering with plaintiffs' right to visit their children at school, and prohibiting defendants from cruelly punishing and threatening their children. Count 29 asks for a declaratory judgment invalidating section 24-24 of the School Code, which relates to the disciplining of students. The facts alleged in these two counts relate to the alleged threats and treatment of the minor plaintiff by the principal alleged in the prior counts and also to certain statements by the principal concerning visitation at school.

Defendants' motion to dismiss and strike plaintiffs' first-amended complaint contained numerous grounds urged in support of dismissal. One of them contended that plaintiffs had

"improperly joined in one lawsuit
distinct and independent matters"

and that plaintiffs had

"attempted to unite in one lawsuit,
distinct and disconnected subject
matters, parties, facts ***."

This same ground was urged in a motion to strike and dismiss Counts 1 through 27 of plaintiffs' second-amended complaint.

In dismissing Counts 1-27 the trial court ruled, inter alia, that the complaint was a good example of multifariousness. Plaintiffs' motion to reconsider or vacate urged various sections of the Civil Practice Act, including sections 23, 24 and 44 (Ill. Rev. Stat. 1973, ch. 110, pars. 23, 24, 44), in support of the joinder of parties and causes in the complaint, and plaintiffs suggested possible groupings of various counts in the complaint which could be tried separately to avoid inconvenience to the defendants. Plaintiffs' motion was denied.

Sections 23, 24, and 44 of the Civil Practice Act provide:

"Par. 23. Joinder of plaintiffs. Subject to rules, all persons may join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, whenever if those persons had brought separate actions any common question of law or fact would arise: provided, that if upon the application of any party it shall appear that joinder may embarrass or delay the trial of the action, the court may order separate trials or enter any other order that may be expedient. Judgment may be given for any one or more of the plaintiffs who may be found to be entitled to relief, for the relief to which he or they may be entitled."

Par. 24. Joinder of defendants. (1) Any person may be made a defendant who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction or series of transactions out of which the controversy arose, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein, or against whom a liability is asserted either jointly, severally or in the alternative arising out of the same transaction or series of transactions, regardless of the number of causes of action joined.

(2) It is not necessary that each defendant be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make any order that may be just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

(3) If the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, and state his claim against them in the alternative in the same count or plead separate counts in the alternative against different defendants, to the intent that the question which, if any, of the defendants is liable, and to what extent, may be determined as between the parties." As amended by act approved July 19, 1955.

"Par. 44. Joinder of causes of action and use of counterclaims. (1) Subject to rules any plaintiff or plaintiffs may join any causes of action, whether legal or equitable or both, against any defendant or defendants; and subject to rules the defendant may set up in his answer any and all cross demands whatever, whether in the nature of recoupment, setoff, cross bill in equity or otherwise, which shall be designated counterclaims.

(2) The court may, in its discretion, order separate trial of any causes of action, counterclaim or third-party claim if it cannot be conveniently disposed of with the other issues in the case. Legal and equitable issues may be tried together if no jury is employed."

These provisions of the Civil Practice Act were designed to liberalize the rules governing joinder of parties at law under the common law and incorporate the beneficial features of the equity rules on joinder and apply them to all actions. (Jenner and Tone's Notes to S.H.A., ch. 110, par. 24; Tone and Stifler, 1967 Ill. L.F. 209, 216-217; 43 Ill. L. Rev. at 41; Sommers v. Korona (1964), 54 Ill.App.2d 425, 429.) Thus while cases dealing with the equitable doctrine of multifariousness may aid us in our interpretation of the above quoted provisions of the Civil Practice Act, we prefer to analyze the joinder of parties and causes sought to be accomplished in plaintiffs' second-amended complaint by consideration of the requirements of the Civil Practice Act. Johnson v. Moon (1954), 3 Ill.2d 561, 566-568; cf., Kronan Build. and Loan Ass'n v. Medeck (1938), 368 Ill. 118, 120-121.

Section 44 provides for the joinder of all claims a plaintiff or plaintiffs and a defendant or defendants may have against each other. Where there are multiple parties, the limitations of sections 23 and 24 must be observed. (Johnson v. Moon, 3 Ill.2d

561, 567; Opal v. Material Service Corp. (1956), 9 Ill.App.2d 433, 443.) Section 23 contains two requirements where multiple parties plaintiff are sought to be joined in one action: (1) there must be a single transaction or series of transactions giving rise to the claims involved; (2) there must be a common question of law or fact. (Rodriguez v. Credit Systems Specialists, Inc. (1974), 17 Ill.App.3d 606, 612.) The common question or questions of law or fact must be significant; and if a series of transactions is involved, the transactions must be closely related. City of Nokomis v. Sullivan (1958), 14 Ill.2d 417, 420.

In plaintiffs' 29-count second-amended complaint there appears at least six distinct transactions or groups of transactions, even more numerous legal theories, three sets of plaintiffs, and five defendants. Although the defendants are generally the same in all the counts except that the superintendent is joined either in his official capacity or individually in Counts 13-18 and 28 and 29; and section 24(2) does not require each defendant be interested as to every cause alleged or as to all the relief prayed for; the complaint fails to meet the two-pronged requirement of section 23. Counts 1-20 are brought on behalf of the minor plaintiff and are based on at least four separate transactions: the alleged beating on January 22, 1971; the detention on March 10, 1971; the "special education" program of March 11th through March 16, 1971; and the alleged defamation and threats of September 7, 1971. Counts 21 and 22 are brought by the plaintiffs' attorney for an alleged defamation which also occurred on September 7, 1971. Counts 23 through 27, brought by the Bauers are based on two further transactions: an alleged defamation of March 11, 1971, and certain letters dated January 25th and 26th and March 5, 1971. Counts 28 and 29, also brought by the Bauers, allege a number of the already alleged transactions plus certain facts relating to visitation not otherwise pleaded.

The transactions alleged involving the three sets of plaintiffs are, for most of the counts, distinct. The alleged slander of attorney Hamer took place at a different time and has little directly to do with the alleged assault and battery, false imprisonment, or special education program which form the basis for counts 1-18 brought on behalf of the minor plaintiff; and none of these transactions relate directly to or are a necessary part of the actions constituting the alleged libel, slander and invasion of privacy of the minor plaintiff's parents. While all these transactions would appear from the pleadings to be the result of and center around escalating difficulties between the parties originating from disciplinary responses to the minor plaintiff's behavior at school, such a general and attenuated background relationship does not make the transactions a "series of transactions" as that phrase is used in section 23. This is not a continuous series of explosions (Opal v. Material Service Corp., 9 Ill.App.2d 433; Baker v. Healy Co., (1939), 302 Ill.App. 634) or pollutions (City of Nokomis v. Sullivan, 14 Ill.2d 417; Thomas v. Ohio Coal Co., (1916), 199 Ill.App.50) which are difficult or impossible to separate for purposes of fixing liability from particular incidences by particular offenders. The instant case involves transactions not only separate in time but also in character, and in the quality or type of injury suffered by the plaintiffs. The transactions involved in plaintiffs' second-amended complaint are not closely enough related to constitute a series of transactions allowing joinder of the three sets of plaintiffs in one action. Schroeder v. Busenhardt (1967), 80 Ill.App.2d 431, 439-440; Sommers v. Korona, 54 Ill.App.2d 425, 434-436.

The numerous causes brought by the several plaintiffs are, for the most part, also lacking in significant common questions of law or fact. The requirement of significance is important (Opal v.

Material Service Corp., 9 Ill.App.3d 433, 448), and it is lacking in the instant case.

In the instant case the causes of action are generally legally distinct: assault and battery, false imprisonment, cruel punishment, slander and injunction by the minor plaintiff; invasion of privacy, libel, slander (based on different words) and injunctive and declaratory relief by the parents; and slander (based on different words) by Hamer. Although there are some common questions regarding the different immunities granted under the Tort Immunity Act and the indemnity provisions of the School Code, these questions are by no means common to every count or type of cause of action. Many counts are based on the common law; some request punitive damages only which involve section 2-102 of the Tort Immunity Act, others only compensatory damages; some allege insurance waiver, others do not; some allege indemnity, others do not; some actions have particular immunities, others do not (e.g. Libel and Slander, sec. 2-107); and some actions do not involve immunity or indemnity at all, e.g. injunctive and declaratory relief.

Although the parties defendant are generally the same and there might be overlapping factual background circumstances among the various causes of action, the important or controlling questions of fact are distinct and dependent upon the separate transactions and particular types of causes of action involved. For example there are very few material facts common to Hamer's slander actions and the minor plaintiff's false imprisonment actions. For the most part, the common fact questions when compared with all of the fact questions which must be determined in each of the plaintiff's causes of action are not of such comparative weight or importance as to justify the joinder which is sought to be vindicated here.

Our analysis has primarily dealt with the improper joinder of plaintiffs under Rule 23 of the Civil Practice Act. From this it appears the trial court to effect proper joinder of parties was correct in dismissing counts 1-22, which involved separate plaintiffs and transactions and retaining for adjudication counts 28 and 29, brought by the Bauers (Ill.Rev.Stat. 1973, ch. 110, par. 26; 43 Ill. L. Rev. 41, at 43 n. 9 and accompanying text; see e.g., Rodriguez v. Credit Systems Specialists, Inc., 17 Ill.App. 3d 606.) No request or submission was made by plaintiffs for the retention of different counts to effectuate proper joinder in place of those retained by the court. By retaining counts 28 and 29 the court did not impermissibly dismiss the entire complaint.

The question remains, however, whether the court properly dismissed Counts 23-27 which also were brought by the Bauers as plaintiffs. Although Counts 23-27 join as defendants the Board and the principal, or in the alternative Kerr individually, and Counts 28 and 29 join the Board, and the principal and the superintendent only in their official capacities as party defendants, we have previously noted that subsection 24(2) does not require each defendant be interested as to all the relief requested or every cause included in the proceedings. Subsection 24(1), however, retains the series of transactions requirement that section 23 contains and on this ground Counts 23-27 were properly dropped from the remaining two counts.

The transactions which form the basis for Counts 23-27 are alleged slanderous utterances which took place on March 11, 1971, and certain letters dated January 25th, 26th and March 5th. Counts 28 and 29 requesting declaratory and injunctive relief are directed to alleged difficulties in visitation and to the alleged mistreatment of the minor plaintiff. The only transactional overlap between the dismissed counts and the retained counts is an allegation in the retained counts that a letter of January 26, 1971, has some bearing

on the Bauers visitation rights. This same letter was one of several upon which the Bauers based Counts 25-27, charging invasion of privacy and libel. Other than this overlap, the transactions which form the basis of retained counts 28 and 29 are distinct and separate. Moreover, it has been noted that considerations of multifariousness, common question, and "same transaction" are incapable of precise definition so that the trial court is given wide discretion in applying these tests. (Opal v. Material Service Corp., 9 Ill.App.2d 433, 448; Tone and Stifler, 1967 Ill. L. F. 209, 217.) We cannot say that the trial court in the case before us abused its discretion in dismissing Counts 23 through 27 as well as Counts 1-22.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

THOMAS J. MORAN, P.J. and RECHENMACHER, J. concur.

73-15

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 3rd day of December, in the year of our Lord one thousand nine hundred and seventy-three, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable WILLIAM L. GUILD, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
October 2, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED
OCT 2 - 1966
LOREN L. STROZ, Clerk of the Court
Appellate Court, 2nd District

VICTOR MAGNUS,)	
)	
APPELLANT	)	Appeal from the 19th
	)	Judicial Circuit,
-VS-	)	Lake County
)	
	)	Hon. John L. Hughes
SILVENIS MATTHEWS and	)	Judge presiding
FRANCES MATTHEWS, his wife,)	
)	
APPELLEES.)	

MR. JUSTICE GUILD delivered the opinion of the Court:

The plaintiff, Victor Magnus, herein filed a forcible entry and detainer action against the defendants, as tenants, for possession of the premises in question. The defendants then filed a counter-complaint alleging that they were not tenants but, in fact, contract purchasers of the premises. In a bench trial the trial court found in favor of the defendants and counter-plaintiffs. The owner of the premises, Victor Magnus, has appealed.

The basic question presented is whether the plaintiff should have been allowed to amend his pleadings to assert the Statute of Frauds. The other issues presented are: 1) whether the unsigned Articles of Agreement for Warranty Deed should have been admitted; 2) whether the court erred in admitting receipts for Traveler's Checks without determining the availability of the original checks; and, 3) whether the court erred in refusing to admit plaintiff's Group Exhibit, being cancelled checks for alleged repairs to the premises.

On May 1, 1966 an oral agreement was entered into between the parties whereby the Matthews were to pay \$85 per month to Magnus and, in addition, pay the taxes and insurance. Matthews entered

into possession of the premises. Magnus, the owner, claims the Matthews were tenants; while the Matthews claim they were contract purchasers. In the latter part of 1971 the record discloses that Magnus presented Articles of Agreement for Warranty Deed to the Matthews for the purchase of the premises in question for \$14,500, payable monthly at the rate of \$85, including interest at 7% per annum. The Matthews refused to sign this Agreement. The Articles of Agreement for Warranty Deed tendered to the Matthews in 1971 was dated May 1, 1966.

Both Mr. and Mrs. Matthews testified that the oral agreement entered into in 1966 was for the purchase of the premises in question for the sum of \$10,000, payable at the rate of \$85 per month, with no interest being charged. They further testified that the agreement was that they were to pay the taxes and insurance as well. From 1966 to the time of this suit all payments were made, including the payment of the taxes and insurance by the Matthews.

The trial court found that there was an oral agreement for the purchase of the premises and that the amount of the purchase price was \$10,000, payable at the rate of \$85 per month, with no interest.

In the counter-complaint the Matthews attached thereto a copy of the unsigned Articles of Agreement of May 1, 1966 for \$14,500 tendered to them by Magnus in 1971. On motion the unsigned Articles of Agreement were stricken. At the trial, however, the trial court admitted the document "not so much as to show a written contract but to show the intention of the parties at the time". Subsequent to this, Magnus' attorney advised the court that he was going to plead the Statute of Frauds as an affirmative defense, (Ill. Rev. Stat., 1971, ch. 59, sec. 2). Accordingly, when court reconvened a week later, the attorney for the plaintiff moved to

amend the pleadings to allege the Statute of Frauds as an affirmative defense. The trial court denied this motion.

The testimony of Magnus at trial was, at best, confusing. While he denied that he entered into a contract to sell the property in question to the Matthews in 1966, he readily admitted that he submitted the proposed contract for the purchase of the premises in 1971. It is interesting to note that the tendered contract provided for monthly payments of \$85 to be applied first to interest at the rate of 7% per annum and the balance to principal. The interest on \$14,500 at 7% per annum totals \$1,015. The twelve monthly payments at \$85 per month total \$1,020, leaving \$5 per year applicable to principal. He testified that he paid \$9,500 for the property in question in 1964, however, upon cross-examination, it was disclosed that he, in fact, paid \$4,000 for the property in 1962. He further testified that he made improvements to the property both before and after the Matthews were in possession. The amount of these improvements were variously estimated by him at "\$12,000 to \$13,000" and "\$13,000 to \$14,000". He admitted that the Matthews had made all the payments of \$85 per month to the date of suit and that they had paid the taxes and insurance on the property. The Matthews, in turn, testified that, subsequent to their possession, they had made improvements on the premises, including wallboard in the interior, a new pump, had installed a lawn with black dirt in both the front and back yards and replaced the flooring in the kitchen and installed a new sink.

We turn first to the admission of the receipts for the Traveler's Checks evidencing the \$85 per month payments. While it is true, as the plaintiff contends, that the originals of the checks should have been produced rather than the receipts, it is obvious that this is harmless error. The admission of the receipts for the Traveler's Checks was really of no consequence as Magnus admitted receiving all the \$85 monthly payments as they became due.

We turn next to the contention of Magnus that the some 84 checks, totalling about \$12,000, offered as a group exhibit should have been admitted. The checks purported to evidence payment of labor and materials expended on the property in question over a period from 1964 to 1969. The defendants took possession in 1966. The checks in question at no place make any reference to the premises under consideration here. The trial court refused to admit these checks as a group exhibit. Counsel for Magnus then queried him as to each check and asked if it represented labor or material for the Matthews property, to which, in each instance, Magnus replied that it did. The checks were then offered and the court observed, "***I still do not think, in view of the fact of the number of homes that he owns, and in view of the fact that he thinks that these are such and such, that the limited amount of identification that he has given on each of these, that this is sufficient to identify these checks with this particular place." Whether the checks were admitted into evidence or not is of little import in this particular situation. They were considered by the court and he frankly did not believe that they represented labor and material furnished to the premises in question. We, therefore, find that the refusal of the court to admit the checks was not reversible error.

The courts of Illinois have repeatedly stated that where there are two plausible theories based upon conflicting testimony, that the review court will not substitute its judgment for that of the trial court. The Supreme Court stated this principle succinctly in Schulenburg v. Signatrol, Inc. (1967), 37 Ill.2d 352, 356, 226 N.E.2d 624:

"Although a trial court's holding is always subject to review, this court will not disurb a trial court's finding and substitute its own opinion unless the holding of the trial court is manifestly against the weight of the evidence. (citations) Underlying this rule is the recognition that, especially where the testimony is contradictory, the trial judge as the trier of fact is in a position superior to a court of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof. We may not overturn a judgment merely because we might disagree with it or might, had we been the trier of facts, have come to a different conclusion."

In the case before us the trial court chose to believe the testimony of the defendants Matthews. We do not find that the finding of the trial court was against the manifest weight of the evidence.

We do not reach the question as to whether the trial court should have allowed the plaintiff to amend his complaint during the course of the trial to plead the Statute of Frauds. The pleading of the Statute of Frauds would have been to no avail to the plaintiff. It is well settled that where a party has taken possession under an oral contract for the sale of real estate and has made improvements thereon, that this constitutes part performance so as to remove the bar of the Statute of Frauds.

The Illinois Supreme Court, in a case factually similar to the instant case, Manias v. Yeck (1957), 11 Ill.2d 512, 144 N.E.2d 596, stated:

"Finding a contract to exist, we believe the plaintiffs have demonstrated sufficient part performance to remove the bar of the Statute of Frauds. Possession was taken, the \$100 consideration paid, and substantial improvements erected. (citation) The defendants' argument that possession was not taken under the oral contract, but pursuant to the rental agreement, does not square with the facts."

537-538,

Likewise, in Anastaplo v. Radford (1958), 14 Ill.2d 526, 153 N.E.2d 37, the Supreme Court in referring to the Statute of Frauds stated:

"The statute is never available as a defense where there has been sufficient performance by one party in reliance upon the agreement. Thus an oral promise to convey land will be specifically enforced in equity, notwithstanding the Statute of Frauds, where the promisee has taken possession of the property, made valuable improvements and has furnished consideration for the conveyance."

In the case before us it is undisputed the defendants took possession of the premises, made improvements thereon, paid the taxes and insurance and the trial court was justified, from the facts presented at us, in finding that an oral contract for the sale of the property in question actually was entered into in 1966. The errors, if any, complained of are harmless at best. We find, under the authority quoted above, that the bar of the Statute of Frauds is not available to the plaintiff under the facts presented in this case. Judgment of the trial court affirmed.

AFFIRMED. MORAN, P.J., and SEIDENFELD, J., concur.

72-206

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable WILLIAM L. GUILD, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
September 19, 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

Abstract

FILED

IN THE

SEP 19 1974

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LOREN J. STROIZ, Clerk pro tem
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee)	
	)	Appeal from the Circuit
v.	)	Court for the 17th Judicial
	)	Circuit, Winnebago County.
ROGER L. KNELL,)	
)	
Defendant-Appellant)	

Mr. JUSTICE WILLIAM L. GUILD delivered the opinion of the court:

The defendant was found guilty of armed robbery on November 29, 1968 in a jury trial in Winnebago County. He was sentenced to the penitentiary for a term of 3 - 8 years. This conviction was affirmed by this court in People v. Knell (1970), 129 Ill. App. 2d 9, 262 N.E.2d 291 (Abst.). (Petition for leave to appeal denied March 28, 1974 #46324.)

On March 3, 1971 the defendant filed a pro se petition for post-conviction relief. Counsel was appointed for defendant and on December 10, 1971 an amended petition was filed. About 3 weeks later first appointed counsel was granted leave to withdraw, and attorney William Balsley was appointed. On December 23, 1971 the amended petition was dismissed, and at the same time defendant was granted leave to file a second amended petition. On May 4 defendant, again pro se, filed a "Motion to Vacate Judgment". On May 18 this motion was denied, but the trial court again granted defendant's counsel leave to file instant a second amended petition for post-conviction relief.

On May 25, 1972 the second amended post-conviction petition was dismissed by the trial court without an evidentiary hearing.

-2-

On June 22, 1972 the second appointed counsel then filed a motion for leave to withdraw as counsel for defendant, representing that the defendant had threatened to sue him and was dissatisfied with his services. Leave to withdraw was granted and subsequently the defender project was appointed for the purpose of this appeal.

The present attorney for the defendant now appears before this court on the first amended post-conviction petition, the motion to vacate the dismissal of the first amended post-conviction petition, the motion to vacate the dismissal of the second amended post-conviction petition, and the dismissal of the second amended post-conviction petition. Defendant alleges numerous violations of constitutional rights.

Defendant's notice of appeal is limited, however, to a review of the trial court's order of May 18, 1972 denying his motion to vacate the original order of December 23, 1971. The December 23 order dismissed the first amended petition for post-conviction relief without an evidentiary hearing; no report of proceedings is in the record; and as indicated, on the same day, May 18, the trial court granted leave to the defendant at that time to file his second amended petition for post-conviction relief. Subsequently, as indicated, this was done.

We therefore find ourselves confronted with an appeal from the order of May 18, 1972 denying defendant's motion to vacate the order of December 23, 1971 which denied post-conviction relief. However, as indicated, on May 18th the trial court allowed the defendant to file another petition for post-conviction relief. Inasmuch as we are limited to consideration of the May 18th order, and inasmuch as the trial court allowed defendant to file an amended petition on that date, the order of May 18th is not ^{second} final and is not appealable as the matter was still pending on the/amended petition.

-3-

We must, therefore, conclude that the order of May 18th was not a final appealable order, due to the filing of the second amended petition for post-conviction relief.

The court not having found that there was no just reason for delaying the appeal from the order of May 18, 1972, and as the appeal was not from a final order, the same must be dismissed.

DISMISSED.

Moran, T.J. P.J. and Seidenfeld J Concur

72-341

3D
22 I.A. 388

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 3rd day of December, in the year of our
Lord one thousand nine hundred and seventy-three, within and
for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable L. L. RECHENMACHER, Justice
LOREN J. STROTZ , Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
SEP 24 1974 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

No. 72-341

FILED
JAN 2 1974
LORREN J. BROWN, Clerk
Appellate Court, 2nd District
Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit
) Court of the Eighteenth
) Judicial Circuit,
RAYMOND G. KOHL,) DuPage County, Illinois
)
Defendant-Appellant.)

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant was convicted in a bench trial of driving a motor vehicle while license revoked (Ill.Rev.Stat. 1973, ch. 95½, par. 6-303(a)), and sentenced to seven days in the county jail with costs assessed. He appeals.

The case is before us upon a stipulated statement of facts which recites that defendant objected to the introduction of the driving record abstract, and in support of his objection indicated to the court that he desired to cite a case; that the court did not allow counsel to argue his objection or to name the case; that the driving record abstract was admitted into evidence; and that the defendant was subsequently convicted.

The sole issue raised is that the court's refusal to allow his argument and citation of authority denied him the effective assistance of counsel and thus deprived him of due process of law.

The defendant cites no authority in his brief before this court except the reference to the due process clauses of the

United States and the Illinois Constitutions. He does not apprise us of the citation he sought to offer below. His sole argument is that the court's refusal to hear argument indicated that the trial court had either prejudged the case or was biased "in some manner" toward defendant or his counsel. The State answers, also without citation of authority, that whether to allow counsel to present argument on his objections is a matter of discretion and that no abuse of discretion or denial of effective assistance of counsel has been shown on the record. We agree.

Reviewing courts will not consider vague objections as to the admissibility of evidence. (Spencer v. Burns (1952), 413 Ill. 240, 249.) Contentions referenced to an article of the constitution but without argument or citation of authority are not considered on appeal. Vil. of Roxana v. Costanzo (1968), 41 Ill.2d 423, 426.

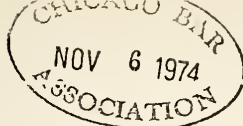
The right to present even a final argument before a trial court, alone, in a criminal case is largely a matter of sound discretion which will be upheld in the absence of a showing of prejudice.. (People v. Wesley (1964), 30 Ill.2d 131, 134-5; People v. Manske (1948), 399 Ill. 176, 188.) Trial court error is never presumed and one who seeks to reverse a decree carries the burden of showing that it is erroneous. Flynn v. Vancil (1968), 41 Ill. 2d 236, 240; Anthony v. Gilbrath (1947), 396 Ill. 125, 127.

The record before us is insufficient to show an abuse of discretion in the court's refusal to hear arguments on the admissibility of a particular item of evidence, and no prejudice has been shown.

We therefore affirm the judgment below.

Affirmed.

THOMAS J. MORAN, P.J. and RECHENMACHER, J. concur.



9-5-74

3D

22 I.A. 530

Nos. 54064 and 56419

RENEE KAY, n/k/a RENEE MARSH,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
GERALD KAY,	)	HONORABLE
	)	L. SHELDON BROWN,
Defendant-Appellant.	)	PRESIDING.

Mr. JUSTICE McGLOON delivered the opinion of the court:

This is a consolidated appeal from orders entered in the circuit court of Cook County, Divorce Division. The appeal is prosecuted pro se by the divorced husband, Gerald Kay. In one of the orders entered below, Kay was found in contempt of court and sentenced to 6 months in the County Jail. In another order entered at a later date, Kay was barred from visiting his two minor daughters until further order of the trial court. These two rulings form the basis of Kay's appeal.

The appellant's brief is difficult to comprehend, but we have distilled from it the following points for review. Kay contends that (1) the proceedings leading up to the contempt finding were not conducted in accordance with due process of law; (2) the evidence was insufficient to sustain the contempt finding; and (3) the trial court improperly barred him from visiting his children. No appellee's brief has been filed.

We reverse.

The relevant facts are as follows. On February 2, 1971, Robert I. Boehm, the attorney for the plaintiff (Kay's former wife) filed a petition for a finding of contempt against Kay. The petition alleged that since 1965 Kay had been harassing attorney Boehm by filing a multitude of petitions and notices in the proceedings, and complaints against him with the Chicago Bar Association. The petition alleged that Kay filed these papers with malice and with the intention of ha-

rassing Boehm and the attorneys in his law firm. Copies of two letters written by Kay to Boehm were attached to the petition. These letters allegedly demonstrated Kay's intention to harass opposing counsel. Finally the petition alleged that Kay was making a mockery of justice.

On February 2, 1971, the trial court held a hearing on this petition. Present at the hearing were Kay and a partner from the law firm representing his former wife. After the hearing the trial court entered a rule to show cause why Kay should not be held in contempt of court and set the matter for a hearing on March 2, 1971 without further notice. The trial judge suggested that Kay hire counsel.

On February 25, 1971, Kay petitioned for a change of venue on the ground that the trial judge was prejudiced against him. He also made a demand for a jury trial on the contempt charges. The trial judge continued all matters until March 2, 1971, but Kay failed to appear at the hearing of that date. He sent Walter Sterczek who was not an attorney to represent him. Apparently some excuse was given for Kay's absence, but this is unclear from the abstract of record. The trial judge struck the petition for a change of venue, found Kay in contempt, and sentenced him to 6 months in jail. The abstract of record does not disclose whether or not the trial judge heard any evidence or made any findings of fact.

The order entered recited, in pertinent part: "Gerald Kay is found to be, and is hereby held, in contempt of court upon the petition filed February 2, 1971, entitled 'Petition for a Finding of Contempt of Court against Gerald Kay'." No other reference to any specific contemptuous acts was made in the order. An order of commitment was entered on March 2, 1971, directing the Sheriff to take custody of Kay until September 1, 1971. Kay was taken into custody by the Sheriff, pursuant to this order.

On April 2, 1971, Kay, through his attorneys, petitioned the trial court to vacate the order of contempt. In response to this motion the trial judge held a hearing on May 4, 1971, at which he released Kay from custody on the understanding that he go to Illinois Research Hospital for psychiatric treatment. At the hearing Kay was present and the court had before it a report from the court psychiatrist. The abstract of record indicates that no testimony was heard.

The order entered on May 4, 1971 barred Kay from visiting his children until further order of court and barred him from filing "any petitions, papers or documents of any sort whatsoever with this court or any court of this land" until further order of court. Until this hearing, insofar as the record indicates, the outstanding visitation order was the order of April 29, 1970, restricting Kay's visitation to the first and third Sundays of each month, between the hours of 1:00 P.M. and 6:00 P.M. It further provided that one of the paternal grandparents pick up the children at the plaintiff's home and return them at the proper times.

On June 2, 1971 the trial court held a hearing on Kay's progress. It appears that Kay had something to do with the filing of papers in court, which conduct was ruled to be a violation of the previous order. The trial court denied the motion to vacate the contempt finding and again committed Kay to the Sheriff's custody to be released on September 29, 1971.

It is clear that the contempt order entered against Kay on March 2, 1971 was for indirect contempt of court. "Indirect contempts are those in which the whole or an essential part of the contemptuous acts occur out of the presence of the court." (People v. Javaras (1972) 51 Ill.2d 296, 300, 281 N.E.2d 670, 672.) The gist of Boehm's petition was that Kay had written threatening letters to him and had filed complaints against him with the Chicago Bar Association. Proof

of these charges required extrinsic evidence, produced pursuant to proper notice and hearing. People v. Sears (1971) 49 Ill.2d 14, 31-32, 273 N.E.2d 380, 389-90.

Indirect contempt was also charged in the remaining portion of the petition which accused Kay of harassing opposing counsel by filing a multitude of papers in the trial court. See People v. Andelman (1931) 346 Ill. 149, 178 N.E. 412, where direct contempt was found when defendant admitted in open court that he had filed papers with the clerk of the court contrary to the court's order, and he was summarily punished.

Aside from the contempt charges being indirect contempt of court, which required a proper hearing, judging from the acts found contemptuous and the nature and purpose of the punishment imposed, it was also criminal contempt. "Criminal contempt of court has been generally defined as conduct which is calculated to embarrass, hinder or obstruct a court in its administration of justice or derogate from its authority or dignity, thereby bringing the administration of law into disrepute." (People v. Javaras, supra, at 671.) The petition alleged conduct which fits into this category, namely, harassment of opposing counsel to such an extent as to constitute a mockery of justice. Abuse of opposing counsel may be so severe as to be contempt of court. People v. DeStefano (1965) 64 Ill. App.2d 368, 385, 212 N.E.2d 368, 378, cert. denied 385 U.S. 989 (1966).

The nature of the imprisonment, a fixed term of 6 months, is also a factor which supports our conclusion. "When punishment is purely punitive: imprisonment for a definite term, fine for a certain sum of money, the contempt is said to be criminal." Board of Jr. College v. Cook County T. Union (1970) 126 Ill.App.2d 418, 428, 262 N.E.2d 125, 129, cert. denied 402 U.S. 998 (1971).

Without addressing ourselves to the issue of whether

another judge was required to hear the contempt charges, we rest our decision to reverse on the insufficiency of the evidence produced at the hearing. The burden of proof in criminal contempt cases is proof beyond a reasonable doubt as to both act and intent. (Peo. ex rel. Chi. Bar Assoc. v. Barasch (1961) 21 Ill.2d 407, 412, 173 N.E.2d 417, 420; City of Chicago v. Hart Bldg. Corp. (1969) 116 Ill.App.2d 39, 253 N.E.2d 496, cert. denied 398 U.S. 950 (1970).) In the instant case we find that the evidence was insufficient to support the criminal contempt finding. The abstract of record of the contempt hearing shows that Kay was not present in court and indicates that the contempt finding was made without the introduction of any evidence. The appellee has not filed anything in this court to suggest the contrary. Under these circumstances we find that the burden of proof has not been met.

Even conceding that Kay did file all the papers mentioned in the petition, there was no showing that he intended to obstruct justice, or embarrass or hinder the court in the administration of justice. (See People v. Bufford (1971) 132 Ill.App.2d 417, 270 N.E.2d 550.) Our reading of the letters from Kay to his former wife's attorneys is that they are not unequivocal declarations of an intention to harass. At best they are unclear. It may safely be said that Kay has been overzealous and at times overly defensive in acting as his own counsel. On this record, however, his conduct has not been shown to warrant 6 months in jail.

In passing we note that the record reveals Kay has burdened the trial court with numerous petitions, motions and notices of appeal. Some of these papers have not been prepared in the proper legal form. Some have been unintelligible in part. Some have contained matter which was extraneous to the matters before the court. In this case an excuse can be made for such inappropriate conduct in that Kay was not an attorney and was not completely familiar with the rules of court. Even so we

hereby note our disapproval of much of his conduct.

The other contention in this appeal is that the trial court committed reversible error in its May 4, 1971 order insofar as it barred Kay from visiting his children until further order of the court. It is well settled that matters of child custody and visitation rest within the court's discretion and that this discretion must be exercised in the best interests of the child. Rodely v. Rodely (1963) 28 Ill.2d 347, 192 N.E.2d 347.


In Illinois visitation of a child by the noncustodial parent is favored. (See Szczawinski v. Szczawinski (1962) 37 Ill.App.2d 350, 185 N.E.2d 375.) In certain cases courts have allowed a temporary order denying visitation although the record did not warrant a permanent denial of visitation. (Coleman v. Brown (1973) 13 Ill.App.3d 378, 300 N.E.2d 269; Malone v. Malone (1955) 5 Ill.App.2d 425, 126 N.E.2d 505.) Complete denial of visitation is a drastic measure. Aud v. Etienne (1970) 47 Ill.2d 110, 264 N.E.2d 196.

A court may modify the terms of visitation which were previously established. The party seeking a modification has the burden to show by competent evidence that it is in the best interests of the child to change the terms. (Keefer v. Keefer (1969) 107 Ill.App.2d 74, 245 N.E.2d 784.) In the instant case, until April 2, 1971, the outstanding visitation order was the order of April 29, 1970. This order granted Kay restricted visitation. On April 2, 1971, Kay was released from custody, sent to Illinois Research Hospital, and his visitation privileges were suspended. That order and the abstract of the hearing show that the only evidence which was apparently considered at the hearing of that date was a report from a psychiatrist with the Psychiatric Institute of Cook County. This report showed that Kay was in need of psychiatric treatment but was not psychotic or certifiable. Considering all the circumstances of this unusual case, we believe that the trial

court erred in terminating Kay's right to visitation. Prior to the order of termination, Kay was permitted to visit his children on the first and third Sundays of each month between the hours of 1:00 P.M. and 6:00 P.M. The order further provided that one of the paternal grandparents pick up the children at the plaintiff's home and return them the proper time. That order of visitation is hereby reinstated, provided however, that the same may be modified by the trial court upon any further hearings as the best interests of the children may require.

Orders reversed.

McNamara, P.J. and Mejda, J., concur.



DONALD SHOEMAKER, et al.,

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)
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V.

Court of Cook County.

William M. Barth, J.

Defendants,

Defendant-Appellant.

The plaintiffs, Donald Shoemaker and Michael Ghilardi, brought this action for property damage and personal injury allegedly sustained while they were business invitees of the defendant, Marvin Walter. They were awarded \$975.00 and \$5,000.00, respectively, by a judgment entered upon a jury verdict.

The cause of action arose from an accident which took place at Walter's place of business on December 8, 1964. Walter operated a wholesale Christmas tree business in an unused portion of the Chicago Great Western Railway Company's Maywood station. Trees were sold in bundles from boxcars parked on a siding immediately south of the station platform. On the north side of the platform were railroad tracks which were in active use. The track bed was about eight inches below the platform. On December 8th the platform was covered with approximately six inches of snow. Shoemaker,

a customer of Walter, drove his van onto the platform. With him were two passengers: Ghilardi, then 13, a newsboy who sold trees on commission for Shoemaker, and Bob Morris, an acquaintance. Shoemaker and Ghilardi selected trees from one boxcar and loaded them; Shoemaker then entered a second car to make further selections, while Ghilardi returned to the van. Ghilardi testified that an employee of Walter ordered the van moved, to make way for another customer's truck. Morris got into the driver's seat and as he was maneuvering the vehicle, the rear wheels dropped to the track bed on the north side of the platform. Morris tried to pull back onto the platform by rocking the van back and forth, with no success. During his attempt a train passed by the station and collided with the rear of the van. The impact pushed the vehicle 20 feet or more across the platform, where it struck another truck and came to rest. The van was damaged beyond repair. Ghilardi, who had remained in the front seat, was thrown into the back of the vehicle. He sustained severe bruises, and was hospitalized for nine days. He and his mother testified that he was unable to return to his normal activities for about six weeks, and that he limped for approximately six months after the accident.

The plaintiffs' complaint named as defendants both Walter and the Chicago Great Western Railway Company. It alleged that Walter by his employee had negligently guided the vehicle into the path of the oncoming train and that the company by its agents had

willfully and maliciously driven its train into the helpless van. At the close of the plaintiffs' case, the defendants presented motions for directed verdicts; only the motion of the railroad company was allowed. Walter offered no defense, and the jury found for the plaintiffs.

Walter filed a written motion for a new trial pursuant to section 68.1 of the Civil Practice Act (Ill.Rev.Stat., 1969, ch. 110, para. 68.1), which listed three grounds: (1) that the proof failed to conform to the pleadings, in that Walter's control of the premises was not established, and there was no showing of a duty to warn the plaintiffs; (2) that the damages awarded were excessive; and (3) that the grant of a directed verdict in favor of the railway company prejudiced him in the eyes of the jury.

On appeal, however, Walter has altered the grounds upon which he bases his claim for relief from the judgment. He now contends that the record neither provides evidence of a negligent act nor shows that his conduct proximately caused the plaintiffs' personal injuries or property damage. Specifically, it is asserted that there was no evidence that he or his employees took part in moving the vehicle or failed to provide a safe place for its movement, and thus that no breach of duty to the plaintiffs was shown, at least none which could be said to have caused the collision.

The Civil Practice Act states, "The post-trial motion must contain the points relied upon, particularly specifying the grounds

in support thereof...." Ill.Rev.Stat., 1971, ch. 110, para. 68.1(2). When a written post-trial motion is filed, errors not specified in it are waived on appeal. Perez v. Baltimore & Ohio R.Co., (1960), 24 Ill.App.2d 204, 164 N.E.2d 209. Because the points raised in the appellant's brief were not included in his post-trial motion, they were waived, and this court will not now consider them. Since those issues which were assigned in the post-trial motion have not been urged or discussed in the appellant's brief, they too are waived. Ill.Rev.Stat., 1971, ch. 110A, para. 341(e)(7); Ruby v. Wayman (1968), 99 Ill.App.2d 146, 240 N.E.2d 699.

The judgment of the Circuit Court is affirmed.

Affirmed.

McNamara, PJ., and Mejda, J., concur.



59939

ALL STATE LUMBER COMPANY,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
v.)	
)	
EDWARD DELGADO,	)	HON. JAMES A. GEOCARIS,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

Edward Delgado (defendant) has appealed from a judgment entered against him and in favor of All State Lumber Company (plaintiff) in the amount of \$150, after trial by the court without a jury.

Defendant has taken all steps required to perfect and present the appeal to this court including preparation and filing of the report of proceedings and of the complete record and also the preparation and filing of the necessary brief and argument. All of these matters were completed by May 1, 1974; and, since that time, plaintiff has failed to respond in any manner. We are presently in receipt of a motion by defendant for summary reversal of the judgment appealed from. Notice was served upon counsel for plaintiff on July 2, 1974, and no response has been filed.

This court has the right under circumstances of this nature to determine the case on its merits or, alternatively, to reverse the judgment appealed from because of failure of plaintiff as appellee to comply with Supreme Court Rule 343(a), (50 Ill. 2d R. 343(a).) (See Gibraltar Corp. v. Flo Budd Antiques, Inc., 131 Ill. App. 2d 545, 269 N.E.2d 515, leave to appeal denied, and Drovers Nat. Bk. of Chicago v. City of Chicago, 133 Ill. App. 2d 254, 273 N.E.2d 238. See also Georges v. Mallare, 18 Ill. App. 3d 907, 310 N.E.2d 754.) The motion of defendant (appellant) is

granted and the judgment appealed from is summarily reversed. In taking this action, we wish to make completely clear the fact that we have not considered the matter upon its merits so that no criticism of the ruling of the able trial judge is involved.

JUDGMENT REVERSED.

BURKE, J., and HALLETT, J., concur.

(Abstract Only).

JULIUS MATO,

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY

Y.

HONORABLE
JOHN C. FITZGERALD
PRESIDING

Defendants-Appellees.)

Mr. PRESIDING JUSTICE SULLIVAN delivered the opinion of the court,
as modified:

This appeal arises from the granting of a judgment on the pleadings in favor of defendants on plaintiff's complaint seeking reimbursement of attorney's fees and expenses because of defendant's alleged negligence in failing to provide plaintiff with proper insurance coverage.

The facts leading to the initiation of the instant suit began on May 11, 1965, when plaintiff, an insured of Security Insurance Company of Hartford ("Security") sought to obtain a change of automobile endorsement from defendants, his brokers, who were also general agents of Security. Prior to this time, plaintiff had purchased insurance from Security through defendants to cover his automobile. The original policy period was from July 17, 1963 to January 17, 1964, with a subsequent renewal extending plaintiff's coverage to January 17, 1965.

On May 11, 1965, plaintiff called defendants' office and informed Donald Dann that he had replaced his old automobile with a new one and desired to have identical insurance coverage for it. Donald Dann referred him to a secretary, who informed him that according to defendants' files, his automobile policy had lapsed for failure to pay a renewal premium due in January, 1965. The secretary assured plaintiff, however, that defendants would reinstate the coverage and forward a confirmation of the new coverage within a matter of days.

On May 15, 1965, plaintiff received the following information from defendants: (1) a sheet entitled, "Endorsement", dated May 14, 1965, which stated that "[t]his endorsement forms a part of your policy and should be attached to the same without fail"; and (2) a sheet entitled, "Amendment of Declaration", indicating that it was endorsement No. 2 and containing a description of the new automobile with the same coverage as on plaintiff's previous automobile. This endorsement was signed by the president and secretary of Security and by Armand Dann.

In June, 1965, plaintiff was involved in an automobile accident in which both he and his passenger, David Toth, were injured. During plaintiff's convalescence, representatives of Security interviewed him and made assurances that he had nothing to worry about since he was insured by them. Toth ultimately filed suit against plaintiff in Lake County, but before the resolution of that suit, Security, upon learning of the policy lapse, brought a declaratory judgment action in October, 1966, against plaintiff and Toth to determine if plaintiff was insured by it at the time of the occurrence.

In point of time, the next legal activity occurred on May 11, 1967, when plaintiff filed a complaint in Cook County against Donald and Armand Dann, individually and Dann Bros., Incorporated, alleging that as the result of their negligence, Security denied plaintiff coverage for the accident with Toth and therefore defendants should be liable for (1) any judgment entered against plaintiff in the then pending Toth suit; (2) attorney's fees arising out of the defense of the Toth suit; and (3) attorney's fees arising out of the defense of the declaratory judgment action brought by Security. Defendants' answer denied the essential allegations of the complaint.

While the instant Cook County action remained pending, both plaintiff and Security filed motions for summary judgment in the Lake County declaratory judgment action. The trial court there

entered judgment for Security, finding that no coverage existed for plaintiff at the time of the occurrence. On appeal, the Appellate Court for the Second District, in Security Insurance Company of Hartford v. Mato, 108 Ill.App.2d 203, 246 N.E.2d 685 (April 7, 1969) reversed this finding and held that plaintiff was insured by Security as the result of entering a contract for insurance with its general agent, Donald Dann, and for the additional reason that a lapse of 16 months before filing its action estopped Security from denying that insurance coverage existed. On remand, the trial court entered judgment in favor of plaintiff and Toth against Security for the amount of Toth's damages which, at that time, had been determined in his separate action, and judgment for plaintiff's medical expenses under the policy's medical benefits provision.

In September, 1971, defendants filed a motion for summary judgment in the instant suit, and in response thereto, plaintiff asserted that there were genuine issues of fact relating to the damages suffered by him as the result of defendants' alleged negligence. Specifically, plaintiff referred to the expenses and attorney's fees incurred in defending Security's declaratory judgment suit and his participation in the defense of the Toth suit. A motion judge hearing defendants' motion for summary judgment treated it as "raising solely a defense of prior action pending" and after finding that "the record of the prior action in Lake County is not fully set out", denied the motion "without prejudice to renew either on prior action pending or any other legal issue."

Thereupon, in November, 1971, defendants filed an amendment to their answer, asserting the payment by Security to Toth of his judgment against plaintiff, as well as payments by Security of plaintiff's medical expenses. In this amendment, defendants alleged that the appellate court, having estopped Security from disclaiming coverage, had determined the issue that defendants were in fact and in law the agents of Security and, therefore, that the claim for attorney's fees in the instant case had been

previously adjudicated.

In the ongoing Lake County litigation, Security filed a third-party complaint against Dann Bros., Inc. (one of the defendants here), making plaintiff herein an additional defendant. The record is incomplete; however, it is indicated that an order was entered on November 9, 1971, in which the Lake County Circuit Court denied a motion for summary judgment of Security and granted summary judgment in favor of Dann Bros., Inc. against Security in its third-party action. Security appealed from that judgment, and the Appellate Court for the Second District, in Security Insurance Company v. Mato, 13 Ill.App.3d 11, 298 N.E.2d 725 (July 9, 1973), in reversing, found that questions of fact as to liability remained and remanded the matter to the trial court for further proceedings. It is indicated that this matter remains pending in Lake County, but the record fails to disclose the issues involved therein.

In June, 1972, in the instant action, plaintiff moved for summary judgment on the issue of liability, asserting there was no material issue of fact as to the negligence of defendants and, in support thereof, alleging that the appellate court in the first of the two aforementioned appeals had found that defendants were negligent in their efforts to provide coverage for plaintiff. In their answer thereto, defendants denied any prior adjudication of its negligence and also moved for judgment on the pleadings, alleging that the only remaining issue, that of attorney's fees, had been adjudicated by an order of the Circuit Court of Lake County entered January 27, 1972, on plaintiff's counterclaim there for attorney's fees, as follows: "It is further ordered that Counter-Plaintiff Julius Mato's claim for attorney's fees be and the same is hereby denied." Defendants here have asserted, in their answer, that because attorney's fees were denied by this order in plaintiff's counterclaim against Security, that they could not be collected from defendants, who were agents of Security.

The trial court entered judgment on the pleadings in defendants' favor and conversely denied plaintiff's motion for summary judgment. Plaintiff appeals from this order, claiming that the trial court erred in not allowing him to recover attorney's fees and the expenses of prior litigation with Security, which he alleges resulted from defendants' negligence.

OPINION

It appears to us that at the time the trial judge granted defendants' motion for judgment on the pleadings, the record before him showed (1) there had been a Lake County declaratory judgment complaint filed against plaintiff by Security and that plaintiff had filed a counterclaim therein for attorney's fees; (2) the counterclaim had not been presented to the trial judge, but rather the record before him indicated that plaintiff filed a motion for summary judgment against Security and Dann Bros., Inc. (one of the defendants here) on a counterclaim to Security's third-party complaint; (3) an order had been entered in the Lake County action denying plaintiff's counterclaim for attorney's fees; and (4) no appeal was taken from that order. Thus, it appears the trial judge found that plaintiff was barred from presenting the same claim in the instant case. However, by stipulation of the parties, the record has been corrected in this court to reflect the fact that the motion of plaintiff for summary judgment on his counterclaim in Lake County against Security and Dann Bros., Inc. was never filed and that, in fact, Dann Bros., Inc. was never a counter-defendant. Thus, the record here now indicates that there was no prior adjudication of the claim of plaintiff for attorney's fees and expenses against any of the defendants here.

Defendants also contend that the Lake County order, denying plaintiff's claim for attorney's fees from Security, estops any such claim against defendants here. It is true that if the counterclaim against Security was predicated solely on the alleged

negligence of its general agents, defendants here, then the finding in favor of Security in Lake County would have been an adjudication that defendants were not negligent. In this event, the doctrine of collateral estoppel would apply to bar plaintiff's claim here. (Gonyo v. Gonyo, 9 Ill.App.3d 672, 292 N.E.2d 591.) On the other hand, if plaintiff's counterclaim against Security was premised on grounds other than the negligence of its general agents, then the finding in favor of Security would not necessarily be a bar to the claim of plaintiff against those general agents.

It has been indicated by both parties during oral arguments here that the counterclaim was not premised on the negligence of the general agents.

In view of the foregoing, we are of the opinion that because an incomplete record was initially presented to the trial court, the ends of justice would best be served by remanding this action for a hearing on the issues remaining on the basis of the additional and corrected information referred to in this opinion.

Reversed and remanded.

BARRETT, J. and LORENZ, J. concur.

PUBLISH ABSTRACT ONLY.

No. 58056

JULIUS MATO,

Plaintiff-Appellant,

v.

DONALD DANN and ARMAND L.
DANN, Individually and d/b/a
DANN BROS., INCORPORATED, an
Illinois corporation,

Defendants-Appellees.)



ORIGINAL
OPINION

APPEAL FROM THE
CIRCUIT COURT
OF COOK COUNTY

HONORABLE
JOHN C. FITZGERALD
PRESIDING

Mr. PRESIDING JUSTICE SULLIVAN delivered the supplemental opinion of the court upon denial of the petition for rehearing:

While this matter was pending in this court, additional pleadings were filed from which we are able to determine that in Security's declaratory judgment action in the Lake County Circuit Court against Mato (plaintiff here) and Toth, plaintiff filed a counterclaim in 1967 against Security which, among other things, asked for attorney's fees and expenses. It appears also that Security filed a third-party complaint in that Lake County action against Dann Bros., Inc. (one of the defendants here). The content of this third-party complaint does not appear in the record nor does the date of its filing.

During oral arguments in this court, plaintiff's attorney represented (1) that a motion for summary judgment,^{1/} appearing from the record here to have been filed by plaintiff in the Lake County proceeding was, in fact, never filed; and (2) that although attorney's fees had been sought in a counterclaim against Security there, no claim for fees had been made there against Dann Bros., Inc.

Subsequent to the oral arguments, plaintiff moved in this court to correct the record to reflect that aforesaid motion for summary judgment was not filed, this motion was supported by the affidavit of his attorney, and defendants' attorney stipulated

^{1/} "To enter an order of summary judgment on behalf of Julius Mato against Security and Dann Bros., Inc. pursuant to a counterclaim for summary judgment heretofore filed in the primary action by Julius Mato in accordance with the decision of the Appellate Court of Illinois."

that the record should be corrected to reflect that the motion had not been filed, and it was so considered in our original opinion.

The significance of the motion lies in the fact that plaintiff asked for summary judgment against both Security and Dann Bros., Inc. on his counterclaim for attorney's fees and expenses and subsequently, on January 27, 1972, the Lake County Circuit Court entered an order which included the following:

"It is hereby ordered that summary judgment be granted in favor of the counter-defendant Security Insurance Company of Hartford and against counter-plaintiff Julius Mato.

It is further ordered that counter-plaintiff Julius Mato's claim for attorney's fees be and the same is hereby denied.

It is further ordered that the court finds no just reason to delay enforcement of appeal of this order."

It was defendants' contention originally that the Lake County order of January 27, 1972, denying plaintiff's request for attorney's fees, from which no appeal was taken, was a bar to any such recovery against all defendants here. In our original opinion, we rejected this contention, holding there was no prior adjudication in Lake County of plaintiff's claims for attorney's fees and expenses against defendants. It is now their contention on rehearing that we should reconsider our position, because the aforementioned motion for summary judgment, which on its face was directed against Security and Dann Bros., Inc., had in fact been filed. Therefore, it contends the order of January 27, 1972 was an adjudication as to both Security and defendants that plaintiff was not entitled to attorney's fees. Exhibits attached to the petition for rehearing establish that the motion had been filed on September 8, 1971.

We have reviewed the record in the light of the corrections and additions mentioned above, and we initially note that although Dann Bros., Inc. was a third-party defendant in the third-party complaint of Security, it was never named as a defendant by plaintiff in his counterclaim for expenses and attorney's fees against Security in the Lake County action in which the January 17, 1972 order was entered. Furthermore, it appears from the record now

before us that on November 9, 1971, more than two months prior to the order in Lake County denying plaintiff's request for attorney's fees, a motion by Dann Bros., Inc. as third-party defendant, for summary judgment against third-party plaintiff Security was granted. This order ended the involvement of Dann Bros., Inc. in that action.

Significant also are the following: (1) The January 27, 1972 order granted a motion of Security for summary judgment as to the counterclaim of the plaintiff there, and at the same time the court denied plaintiff's counterclaim there for attorney's fees; (2) as we have stated before, a plaintiff's counterclaim was against Security only; (3) there is nothing in the January 27, 1972 order which is directed to Dann Bros., Inc.; and (4) the record before us now indicates that the remaining defendants here, Donald Dann and Armand L. Dann, as individuals, were not involved in the Lake County proceedings.

In view of the foregoing, we adhere to our position in the original opinion that the record discloses no prior adjudication of plaintiff's claim for attorney's fees and expenses against any of the defendants here, and we deny the petition for rehearing.

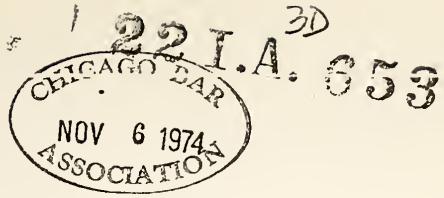
The original opinion was modified somewhat without change in its effect.

Opinion modified.

Petition for rehearing denied.

BARRETT, J. and LORENZ, J. concur.

Publish abstract only.



PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court
	)	of Cook County,
v.)	
)	
JOHNNY MORALES,)	
	)	Honorable Maurice W. Lee,
Defendant-Appellant.	)	Judge Presiding.

Before McNamara, PJ., Dempsey and McGloon, JJ.

PER. CURIAM:

The defendant, Johnny Morales, was charged with the offense of theft in violation of Section 16-1(a)(1) of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 16-1(a)(1)). After a bench trial, the defendant was found guilty and sentenced to nine months at the Illinois State Farm, Vandalia, Illinois. On appeal, the defendant contends that he was not proven guilty beyond a reasonable doubt.

At the trial, Miles Smith testified that he is employed at the IRS [Internal Revenue Service] and formerly was a police officer with the Los Angeles Police Department; that on May 11, 1973, at approximately 11:30 P.M., he entered the hallway of the building in which he lived at 7615 S. Coles, Chicago, Illinois; that two men entered the building ahead of him; that when Smith entered the hallway to his building, one man stood to his left and the defendant stood at his right; and that the man to Smith's left announced a robbery, pulled out a weapon, and pushed Smith to the floor. Smith said he fell on his right side on the floor with his head looking up; and that a man, whom Smith identified as the defendant, took \$69 in cash from Smith's right pocket and a diamond ring from his left finger. Smith stated he had no trouble seeing the defendant; that he looked at him during the course of the incident which took

two or three minutes; and that the lights in the hallway were strong.

Smith testified he went upstairs to his apartment and called the police; that when the police arrived, Smith described the attackers to them; that the man who had initially stood on Smith's left was either a very light negro, a Puerto Rican or a Mexican, 25 or 26 years old, 5 feet, 1 or 2 inches tall with brown or blondish hair which he wore down; and that the other man, who went through his pockets, was a dark negro.

Smith said that on June 2, 1973, he observed two men standing on the sidewalk in front of 7609 S. Coles, Chicago, whom he believed to be the two men that robbed him on May 11th; that he called the police who arrested the defendant and Thomas King; that he identified the defendant as the man who went through his pockets, but could not positively identify the other man who held the gun as one of the attackers.

Thomas King, who was arrested with the defendant, testified that Police Officer Druakulich told him [King] that Smith had positively identified him as one of the two robbers, but could not positively identify the defendant.

The defendant testified that on May 11, 1973, he arrived at the home of a friend, Henry Page, at about 8:30 P.M. and remained there overnight; that two other friends, Andre Litiney and Edward Page, together with Edward Page's wife, were present; that he was drinking and smoking marijuana; and that at about 11:30 P.M. he went to sleep in a folding cot on the back porch; and that he was out of the presence of Page and Litiney for approximately 30 minutes

about 9:00 P.M., when he went upstairs to see Henry Page's mother. The defendant stated that he awoke about 9:00 o'clock the next morning and that he did not leave the house at any time prior thereto. The defendant further stated that he did not take anything from Smith; and that he was not with Thomas King on May 11, 1973.

Henry Page and Andre Litiney corroborated the testimony of the defendant to the effect that they were with him from about 8:30 P.M. on May 11, 1973, at 7323 Coles Avenue, Chicago; that they were drinking; and that the defendant stayed there until about 9:30 o'clock in the morning.

Police Officer Druakulich, called as a rebuttal witness, testified that he arrested Thomas King on June 2, 1973; and that he told King that Smith said he was not positive as to whether King committed the crime but he was very positive about the defendant.

At the close of all the testimony the trial court stated that he believed the testimony of the State's witnesses and that the State had proved the guilt of the defendant beyond a reasonable doubt.

The defendant argues that the judgment should be reversed because his conviction is based "entirely on a [sic] identification made extremely tenuous by the surrounding circumstances, the time between the incident in question and the arrest and the discrepancies between the original description of the attacker and defendant's actual physical appearance". The State argues that Miles Smith, the complainant, had ample opportunity to permit

him to make a positive identification of the defendant; and that the testimony of the defendant and his two alibi witnesses were "filled with improbabilities, inconsistencies, vaguenesses, and uncertainties".

The law is well settled that the uncorroborated identification of a defendant by a single witness is sufficient to convict if the testimony is positive and the witness credible, although contradicted by the defendant or his witnesses. People v. McVet, 7 Ill.App.3d 381, 385, 287 N.E.2d 479; People v. McCray, 12 Ill. App.3d 935, 299 N.E.2d 375; People v. Grey, 14 Ill.App.3d 310, 302 N.E.2d 473. Also, exact accuracy in describing wearing apparel and facial characteristics of the defendant is not necessary where the identification is positive. People v. Miller, 30 Ill.2d 110, 195 N.E.2d 694; People v. Brown, 14 Ill.App.3d 242, 302 N.E.2d 161.

In the case at bar the record discloses that the lighting conditions at the time of the incident were good; that the defendant stood over Smith, a former Los Angeles police officer, as he took \$69 in cash from Smith's right pocket and a diamond ring from his left finger; that Smith looked at the defendant during the course of the incident which took two or three minutes; and that Smith had no trouble seeing the defendant. Further, the trial judge expressly found that he believed the testimony of the State's witnesses and that the State had proved the guilt of the defendant beyond a reasonable doubt.

The mere fact that three weeks elapsed between the incident and the time Smith again saw the defendant on the street, identified the defendant as one of his attackers and caused his arrest, does

not raise a doubt about the identification. People v. Bennett, 9 Ill.App.3d 1021, 1025-1026, 293 N.E.2d 687; People v. Rodgers, 53 Ill.2d 207, 290 N.E.2d 251.

In a bench trial it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given to their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial judge will not be disturbed. People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378; People v. Bracey, 129 Ill.App.2d 57, 262 N.E.2d 748; People v. Brown, 14 Ill.App.3d 242, 302 N.E.2d 161. The trial court chose to believe Smith, who positively identified the defendant as one of the attackers, and its decision should be affirmed.

The defendant also argues that this Court should not disregard the alibi testimony where the sole and only evidence contradicting it rests upon the identification of the defendant as the perpetrator of the crime. While it is true that such evidence may not be disregarded, there is no obligation on the trial court to believe alibi testimony over positive identification of an accused, even though the alibi testimony may be given by a greater number of witnesses. People v. Jackson, 54 Ill.2d 143, 295 N.E.2d 462; People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378; People v. McCray, 12 Ill.App.3d 935, 299 N.E.2d 375; People v. Robinson, 3 Ill.App.3d 843, 279 N.E.2d 526.

In the case at bar Smith had ample opportunity to observe the defendant and to identify him as one of the attackers. At the time of the incident the lights in the hallway were good and

Smith had no trouble seeing the defendant because he looked at him during the course of the incident, which took two or three minutes. Under such circumstances the trial court could and did believe the testimony of Smith over and above the alibi testimony of the defendant and his witnesses.

The cases cited by the defendant are not applicable to the facts in the case at bar.

There is no reversible error in the record and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

3D
221.A. 654



59346

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
WILLIE L. BYRD,	)	HONORABLE RICHARD FITZGERALD,
	)	Presiding.
Defendant-Appellant.))	

PER CURIAM: First District, Second Division.
Before Stamos, J., Leighton, J., and Downing, J.

Willie L. Byrd, defendant, was charged by indictment with the crimes of murder and armed robbery (Ill. Rev. Stat. 1969, ch. 38, pars. 9-1 & 18-2). On December 15, 1971, defendant entered a negotiated plea of guilty and was sentenced to a term of 14 to 20 years on each charge, the sentences to run concurrently. Defendant appeals, arguing that the trial court failed to admonish him as to the nature of the charge prior to the entry of his plea of guilty.

On December 15, 1971, after a motion to suppress the identification testimony had been heard, defendant requested a pretrial conference with the court. After the conference, defense counsel, in defendant's presence, informed the trial judge that defendant wished to enter a plea of guilty to the charges of felony murder and armed robbery. The trial judge specifically asked defendant if he wished to enter a plea of guilty to the charges of armed robbery and felony murder and defendant replied in the affirmative. The facts upon which the charges were predicated were stipulated to in open court by both parties. The facts briefly related are that defendant while armed with a sawed off shotgun entered a restaurant with two accomplices with the intent to commit an armed robbery. During the robbery, defendant shot and killed one of the victims and then paused in his flight from the store to empty the cash register. He was arrested shortly after in possession of the sawed off shotgun

and the proceeds of the crime. Thereafter, the trial judge, by questioning defendant, established that at the pretrial conference, the trial judge had stated that upon a plea of guilty he would impose a sentence of 14 to 20 years. The trial judge advised defendant that he had a right to enter a plea of not guilty and persist in that plea. Defendant stated that he was entering the plea voluntarily, that no threat, promises or coercion had been used to induce him to enter a plea of guilty. Defendant, in response to questioning by the trial judge, stated that he understood he was pleading guilty to armed robbery and murder. Defendant was informed that by entering a plea of guilty he waived his right to a jury trial. Defendant was advised that he had the right to remain silent, to cross-examine all witnesses presented at trial and to present evidence on his own behalf if he so chose. The trial judge advised defendant that he was presumed innocent and that by entering a plea of guilty, he waived the right to have the State present evidence against him. The trial judge admonished defendant of the possible statutory penalties for murder and armed robbery. Defendant persisted in his plea of guilty, which was then accepted by the trial court.

Defendant's only argument on appeal is that the trial judge, in accepting his plea of guilty, failed to advise him as to the nature of the charge. The rule that a defendant be advised of the nature of the charge against him does not require the trial court to recite all of the facts which constitute the offense. This court has held that the admonition of the crime by name is sufficient to apprise the defendant of the nature of the crime charged. People v. Carrion, ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 59123, June 28, 1974); People v. Tennyson, 9 Ill.App.3d 329, 292 N.E.2d 223; People v. Wintersmith, 9 Ill.App.3d 327, 292 N.E.2d 220; People v. Wright, 2 Ill.App.3d 304, 275 N.E.2d 735; People v. Rosado, 2 Ill.App.3d 231, 276 N.E.2d 473; People v. Palmer, 1 Ill.App.3d 492, 274

N.E.2d 910; People v. Carter, 107 Ill.App.2d 474, 246 N.E.2d 320; People v. Harden, 78 Ill.App.2d 431, 222 N.E.2d 693.

In the case at bar, the trial judge specifically asked defendant if he wished to enter a plea of guilty to the crimes of "armed robbery and felony murder." Thereafter, the facts which provided the basis for the indictment were stipulated to by both sides. Defendant, in response to questioning by the trial judge, stated that he understood that there had been a pretrial conference and that upon his plea of guilty he would be sentenced to a term of 14 to 20 years. Defendant stated he understood that he had a right to plead not guilty and to persist in that plea. Defendant stated that he was entering the plea voluntarily and of his own free will and that no threats or promises or coercion had been used to induce him to enter a plea of guilty. In response to questioning by the trial judge, defendant stated that he understood that he was charged with "armed robbery and murder." The trial judge specifically advised the defendant that by entering a plea of guilty he waived the right to a trial by jury, the right to remain silent, the right to cross-examine the witnesses, the right to offer evidence in his own behalf and the right to have the State present evidence against him. The trial judge informed the defendant of the statutory penalties for murder and armed robbery. Defendant stated that understanding all of his rights he wished to enter a plea of guilty, which was then accepted by the trial judge. Under these circumstances, we conclude that the defendant was sufficiently informed as to the nature of the charges to which he was entering a plea of guilty.

For the foregoing reasons the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.

221.A. 655



PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

CLEMON PORTER,

Defendant-Appellant.

)
)
) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
)

)
)
)
)
) HON. ROBERT J. SULSKI,
) JUDGE PRESIDING.
)

Mr. JUSTICE BURMAN delivered the opinion of the court.

The defendant, Clemon Porter, was charged by an information with armed robbery. Following a preliminary hearing at which the court determined that there was probable cause to hold him to the grand jury, he pleaded guilty to plain robbery and was sentenced to four to six years in the penitentiary. In the present appeal he contends that the court did not properly advise him of his rights prior to accepting his plea.

The victim of the offense, Susie Williams, testified at the preliminary hearing that she was an employee of the LaSalle Hotel and was there on the morning of October 31, 1972. The defendant, who resided in the hotel, forced her into a locker room at knifepoint, bound her hands and feet, and robbed her of \$1.60. She managed to free her feet and made her way to the hotel desk, where the police were called. The police returned a short time later with the defendant in custody and she identified him as her assailant. Based upon this testimony, the court made its finding as to probable cause.

Immediately after the court announced its finding, the defendant, through his counsel, stated that he wished to address the court. He informed the court that he was a drug addict and was "guilty of all the charges." He stated that he wished to "get everything over with" that day and that he was willing to plead guilty. The court then ordered the case passed for a conference between the prosecution and defense.

Following the conference, the prosecution asked leave to proceed by way of an information charging the defendant with plain robbery and advised the court that the defendant would plead guilty. Thereupon the following exchange occurred between the court and the defendant:

THE COURT: Mr. Porter, I now have before me an information charging you with plain robbery. Originally you were charged with armed robbery.

Do you wish to plead to the charge of plain robbery?

THE DEFENDANT: Yes, sir.

THE COURT: How do you plead, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: You understand in entering a plea of guilty to that charge you are waiving your right to have a hearing by the Grand Jury of Cook County and also waiving your right to a regular jury trial and submitting the matter for me to pass on?

THE DEFENDANT: Yes.

THE COURT: By waiving your right to a jury trial you understand you are waiving your right to cross examine the witnesses and have a full hearing or a trial?

THE DEFENDANT: Yes, sir.

THE COURT: You understand further on your plea of guilty to plain robbery you could be sentenced for a period of years, not less than one and all the way up to twenty, called an indeterminate term, one to five, one to ten, one to five.

Understanding all that, do you still wish to plead guilty?

THE DEFENDANT: Yes.

THE COURT: You haven't been threatened or promised anything for your plea?

THE DEFENDANT: No.

THE COURT: You are pleading guilty because you are in fact guilty?

THE DEFENDANT: Yes.

THE COURT: Mr. State's Attorney, the factual situation upon which the plea is based was heard by this Court within the last hour and a half. I am familiar with the case, and it is a part of the record on the preliminary hearing. I don't think it is necessary to put it in the record again.

MR. LEARY: We would agree, but the witness who testified before you is still present and stand before you in open court.

THE COURT: All right.

On the plead there will be a finding, and judgment on the finding.

A hearing in aggravation and mitigation was held, and it was revealed that the defendant had an extensive criminal record dating back to 1959. Pursuant to the recommendation of the State, the court sentenced the defendant to four to six years in the penitentiary.

The defendant argues first that the court accepted his guilty plea and then perfunctorily advised him of his rights. This argument is not supported by the record. As the foregoing excerpt from the proceedings demonstrates, the court advised the defendant that (1) he was pleading guilty to plain robbery, (2) by pleading guilty he waived his rights to a hearing by the grand jury, a regular jury trial, and the opportunity to confront and cross-examine witnesses, and (3) he could receive an indeterminate sentence from one to twenty years. The court also ascertained that the defendant had not been threatened or promised anything for his plea and that he was pleading guilty because he was in fact guilty. Only then did it accept the defendant's plea by stating, "All right. On the plea there will be a finding, and judgment on the finding."

Next the defendant argues that the court's admonition concerning the maximum and minimum sentences that he could receive was not sufficient to meet the requirements of Supreme Court Rule

402 (Ill.Rev.Stat.1973, ch. 110A, par. 402). This argument likewise is unsupported by the record. Supreme Court Rule 402 requires that the trial court advise the defendant of the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences. In the present case the court informed the defendant that he could be sentenced for a period of years, not less than one nor more than twenty. It also provided several examples of an indeterminate sentence. In our view this was sufficient to comply with both the letter and the spirit of Rule 402, and we reject the defendant's contention that it was confusing and contradictory.

We also reject the contention that the court failed to advise the defendant that he could receive a longer sentence because of his prior record. We are of the opinion that the language of Rule 402 concerning prior convictions is meant to apply to situations where the statute specifies a greater penalty for a second or subsequent offense and not the situation where, as in the present case, the defendant may receive an enhanced sentence due to material brought out at a pre-sentence hearing.

Finally, the defendant argues that his plea was defective because the court failed to advise him that he had the right to plead not guilty or to persist in that plea. Rule 402 requires substantial compliance with its provisions. The test to be applied is whether the record discloses that the defendant's plea was voluntary and understandingly entered. (People v. Williams, (1973), 16 Ill.App.3d 199, 305 N.E.2d 544; People v. Compton, (1973), 16 Ill.App. 3d 196, 305 N.E.2d 582.(Abstract)) Viewing the record in the present case as a whole, we conclude that the defendant's plea was voluntarily and understandingly entered. He was represented by counsel throughout the proceeding and was thoroughly advised by the court of the consequences of his plea. Moreover, there was a conference between the prosecution and defense at which it was agreed that the defendant would plead to a lesser charge,

and the State would recommend a sentence of four to six years. We believe therefore that the defendant was not prejudiced by the Court 's failure to advise him specifically that he had a right to plead not guilty.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

ADESKO, P. J., and

JOHNSON, J., concur.

(Abstract only)



59297

221.A.^{3D} 659

JERRY WALLS,

Petitioner-Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent-Appellee.

APPEAL FROM THE

CIRCUIT COURT OF

COOK COUNTY.

Hon. Frank J. Wilson,
Judge Presiding.

MR. PRESIDING JUSTICE ADESKO delivered the opinion of the court:

On December 6, 1967, Jerry Walls (petitioner in the instant appeal) entered a guilty plea to a charge of aggravated battery. The sentence imposed by the Circuit Court of Cook County was five years probation, the first year to be served in the House of Correction. No appeal was taken from this proceeding. On July 2, 1970, after a hearing in the Circuit Court of Cook County, it was found that petitioner had violated the terms of the probation noted above and on July 16, 1970, he was sentenced to serve a term of not less than three nor more than nine years in the Illinois State Penitentiary.

On June 16, 1972, petitioner filed his initial petition for relief pursuant to the Post-Conviction Hearing Act. (Ill. Rev. Stat., 1971, ch. 38, §122-1 et seq.) Counsel was appointed to assist petitioner and an amended petition was filed on January 4, 1973. The State responded with a motion to dismiss the petition stating that the allegations did not raise any constitutional issue and even if they could be construed as raising such an issue, they were mere allegations, insufficient to require an evidentiary hearing. Following

argument on this motion before the Honorable Frank J. Wilson, the State's request was granted and the petition dismissed. A Motion for Reconsideration, filed subsequent to the dismissal, was denied, petitioner then bringing the instant appeal.

Petitioner claims that it was error to grant the State's motion to dismiss and not, therefore, hold an evidentiary hearing as a motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency. It is urged that if the trial court had considered the legal sufficiency of the petition, a full evidentiary hearing regarding the petition would have been necessary to determine the truth of the allegations contained therein. However, we note that the burden of proving a substantial deprivation of constitutional rights lies with the petitioner. (People v. Watson, 50 Ill. 2d 234, 236, 278 N.E. 2d 79; People v. Smith, 45 Ill. 2d 399, 404, 259 N.E. 2d 247.) Where allegations of constitutional deprivation are not supported by affidavits, records or other evidence showing a violation of these rights, a petition may be dismissed without an evidentiary hearing. People v. Farnsley, 53 Ill. 2d 537, 549 293 N.E. 2d 600; People v. Bliss, 44 Ill. 2d 363, 366-367, 255 N.E. 2d 405; and People v. Reed, 36 Ill. 2d 358, 359-360, 223 N.E. 2d 103.

Petitioner first claims that his plea of guilty was based upon unfulfilled promises by his trial counsel regarding the sentence he would receive is clearly the type of allegation which may be dismissed without an evidentiary hearing in light of the

authority cited above. The record reveals that prior to accepting the guilty plea the court advised petitioner of the possible sentence he could receive as a result of his plea. Following this, the court asked if petitioner wished to persist in his plea and this was answered in the affirmative. Further, no objection was raised by petitioner when the court later imposed the sentence. In People v. Bennett, 9 Ill. App. 3d 332, 292 N.E.2d 159, this same allegation arose out of an almost identical fact situation. As we stated in that case (9 Ill. App. 3d at 334) under these circumstances we are of the opinion that the record adequately refuted the allegation contained in the petition and no hearing on this claim was necessary.

The petitioner directs our attention to several decisions which required an evidentiary hearing. (People v. Williams, 47 Ill. 2d 1, 264 N.E. 2d 697; People v. Wegner, 40 Ill. 2d 28, 237 N.E. 2d 486; and People v. Washington, 38 Ill. 2d 446, 232 N.E. 2d 738.) We believe that these cases may be distinguished from the instant case in that either the allegations were not refuted by the State or by the record (People v. Williams), there had been some support offered by petitioner regarding his claim (People v. Wegner), or petitioner had adequately explained the absence of supporting affidavits. People v. Washington.

The other claim raised by petitioner was that his appointed trial counsel had misrepresented both the strength of the State's case and the weakness of petitioner's position. Specifically,

petitioner alleges that his decision to enter a guilty plea was caused in a large part by his counsel's statement that no witnesses were prepared to testify in his behalf. Several affidavits had been submitted in support of his claim which stated that certain parties had been prepared to testify in petitioner's behalf and had so informed his trial counsel. Petitioner has failed to make a substantial showing of facts necessary to require an evidentiary hearing as no description of the testimony these witnesses were prepared to give was included in these affidavits to allow the court to make a judicial determination of its importance. See People v. Newberry, 55 Ill. 2d 74, 75, 302 N.E. 2d 34, citing People v. Ashley, 34 Ill. 2d 402, 411, 216 N.E.2d 126.

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED

BURMAN, J., and DIERINGER, J., concur.

ABSTRACT ONLY



59375

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
vs.)
BARTHOLOMEW WATTS,)
(Impleaded))
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.
Hon. Philip Romiti,
Judge Presiding.

MR. PRESIDING JUSTICE ADESKO delivered the opinion of the court:

This appeal arises from the defendant-appellant's pleading guilty to three counts of attempted murder contained in indictments 72-2896 and 72-2897 and to six counts of armed robbery charged in indictments 72-2898 and 72-2899. The sole issue raised is whether the guilty plea is invalid because the trial court failed to admonish the defendant that the sentences for the offenses could be imposed consecutively. The defendant contends that this omission by the trial court violated Supreme Court Rule 402 (a) (2) (Ill. Rev. Stat. 1971, ch. 110A, par. 402 (a) (2)), which requires a court before accepting a guilty plea to admonish the defendant as to the minimum and maximum sentences prescribed by law and where applicable the possibility of consecutive sentences. Defendant maintains the trial court's failure prevented him from entering his plea understandingly and voluntarily. We do not agree.

On February 1, 1973, the defendant withdrew his previously entered plea of not guilty and plead guilty to three counts of attempt murder and six counts of armed robbery. The record indicates that the change of plea was the result of a series of conferences between the defense and the State. The

State had agreed that if the defendant pleaded guilty to the four indictments it would recommend concurrent sentences on each indictment of not less than 10 nor more than 20 years. The trial court had indicated that it would concur in the State's recommendation of concurrent sentences on each indictment but that the court would modify the sentence to from 10 to 15 years. The trial court asked the defendant if his attorney had advised him what the recommendations were and what the court's position was. The defendant responded affirmatively. The defendant was then advised by the court that its concurrence in the recommendations and modification of the sentence to from 10 to 15 years was conditional upon the court not hearing anything during the course of the proceedings that would cause it to change its mind. Defendant was advised that if the court did change its position he could withdraw his guilty plea. The defendant indicated that he fully understood this.

The court informed the defendant of the nature of the charges against him and advised the defendant that by pleading guilty he was saying, "Yes, I have committed those acts and I have done those things with which they have charged me in each of those indictments and each count therein." The defendant responded that he understood this. The trial court gave the defendant a detailed explanation of his right to a jury trial^{1.} and admonished him that by pleading guilty he was waiving this right. Defendant was admonished as to his right to confront

1. The court explained to defendant exactly how a jury trial is conducted and further explained that the defendant could waive a jury and be tried by the court.

the witnesses against him and that by pleading guilty he was also waiving this right. The trial court advised the defendant that he had a right to remain silent or he could elect to testify in his own behalf. Defendant was also informed that he could call witnesses in his defense. The trial court admonished the defendant that by pleading guilty he was also waiving these rights. The defendant indicated to the court that he understood his rights and the waiver of them by pleading guilty. The court advised defendant that he did not have to plead guilty and that he could continue to plead not guilty. The trial court inquired of defendant whether any force, threats, or coercion had been utilized to persuade him to change his plea and defendant responded negatively. The defendant was informed as to the minimum and maximum penalty that could be imposed for each offense. The trial court then reiterated all of the admonishments it had given in order to preclude any misunderstanding. The court then accepted the defendant's guilty plea. Defendant was sentenced to a term in the penitentiary of from 10 to 15 years on all counts with the sentences to run concurrently.

We begin a review of this case from the position that a literal compliance with Supreme Court Rule 402 is not necessary but what is required is that the mandates of the rule be substantially followed. (People v. Mendoza, 48 Ill. 2d 371, 270 N.E. 2d 30, 1971.) As our Supreme Court stated in Mendoza, at 374:

"The fact that defendant was not specifically admonished by the court, on the record, as to each and every consequence of his plea does not sufficiently demonstrate that he was, in fact, unaware of these consequences."

The circumstances of each case must be examined in order to determine whether there has been substantial compliance with Supreme Court Rule 402 and whether the defendant understood the consequences of his guilty plea. People v. Charleston, 14 Ill. App. 3d 452, 302 N.E. 2d 687, 1973.

The record in the case at bar indicates that the trial court comprehensively informed the defendant as to his rights and the consequences of pleading guilty. The only omission by the court was its failure to admonish defendant that the sentences could be imposed consecutively. However, the defendant's change in plea was the result of negotiations and the terms of the agreement are spread across the record. The defendant indicated to the court that he had knowledge of the negotiations and the results. Defendant maintains that only when a defendant is properly advised as to the extent of his exposure to punishment can he make an intelligent, realistic and truly voluntary plea. However, defendant knew exactly what his sentence would be and had been apprised as to the exact extent of his exposure to punishment. We agree with the State that the defendant's case is substantially identical to this very court's decision in People v. Reed, 3 Ill. App. 3d 293, 278 N.E.2d 524, 1971. In Reed the trial court had also failed to admonish the defendant as to the possibility of imposing consecutive sentences. In Reed there had also been a negotiated plea and the record indicated the defendant knew in advance what his sentences would be. We held in Reed that there had been substantial compliance with Rule 402 and that the defendant had not been prejudiced in any manner. We make a similar finding in the case at bar. We are of the opinion that the defendant's guilty plea was entered understandingly, knowingly and voluntarily and therefore it is not invalid.

The defendant has cited People v. Flannigan, 131 Ill. App. 2d 1059, 267 N.E. 2d 739, 1971 in support of his position. In Flannigan a conviction on a guilty plea was reversed and the defendant allowed to plead anew because the trial court failed to admonish the defendant as to the possibility of consecutive sentences. However, in Flannigan the guilty plea was not negotiated nor was there any indication in the record that the defendant knew what his sentence would be. As we previously indicated the defendant in the case at bar was cognizant of the negotiations, the results, and the court's acquiescence in the agreement and he, therefore, had knowledge of the exact punishment he was to receive.

The defendant has also cited People v. Zatz, 13 Ill. App. 3d 322, 300 N.E. 2d 16, 1973 and contends that his position is more closely analogous to that of the defendant in Zatz than the defendant in Reed. This contention is premised on the fact that the trial court stated that its concurrence in the agreement was conditional on its not hearing anything during the proceedings which would cause it to change its mind. However, the court did indicate to the defendant that if the court changed its position the defendant would be given an opportunity to withdraw his guilty plea and re-enter a plea of not guilty. It is significant to note that the procedure followed by the court is in compliance with Supreme Court Rule 402 (d) (2) (Ill. Rev. Stat., 1971, ch. 110A, par. 402 (d) (2).) We do not agree that Zatz is controlling.

The United States Supreme Court decision of Boykin v. Alabama, 395 U.S. 238, 23 L. Ed.2d 274, 89 S.Ct. 1709, 1969,

requires that before a guilty plea can be accepted it must affirmatively appear from the record that the plea was entered intelligently, knowingly, and voluntarily. After thoroughly reviewing the record in this case and reading it in a practical and realistic manner, we are of the opinion that there was substantial compliance with Supreme Court Rule 402 and that the defendant knew the consequences of a guilty plea and entered the plea intelligently, knowingly, and voluntarily.

We finally state that our consideration of the negotiations and agreement in this case, the defendant's knowledge of them and the court's concurrence and modification of the recommended sentence do not indicate we are treating this negotiated plea case differently than we would a non-negotiated case. The consideration of these facts and circumstances pertains to whether or not the plea was entered intelligently and voluntarily. For the reasons herein stated, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

BURMAN, J., AND JOHNSON, J., CONCUR.

(ABSTRACT ONLY)



59328

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
NORMAN EAGLIN, MACK CAGE and	)	HONORABLE
NELSON FORREST,	)	JAMES M. BAILEY,
	)	PRESIDING.
Defendants-Appellants.)	

PER CURIAM: (First District, Second Division)

Before Hayes, P.J., Stamos and Leighton, JJ.

Defendants were all found guilty after a jury trial of the crime of armed robbery (Ill. Rev. Stat. 1971, ch. 38, par. 18-2) and were sentenced to a term of four to eight years. Defendants appeal, arguing that the evidence was insufficient to establish their guilt beyond a reasonable doubt and that they were prejudiced by improper arguments of the prosecutor. In addition, defendant Forrest argues that the jury was improperly instructed upon the law.

At trial, Hipolito Maldonado testified that he owns the grocery store located at 1658 W. Ohio, Chicago, Illinois. On February 3, 1972, at approximately 8:30 P.M., he and his helper, Felix Pantoja, were working in the store when two men armed with a shotgun entered the store and announced a holdup. There are three double fluorescent lights in the store which were on at that time. While one man held the shotgun on them, the second man removed the money from the cash register. Mr. Maldonado testified that the robbers took two or three five-dollar bills and over ten one-dollar bills, ten dollars worth of quarters, a dollar's worth of nickels, a few dimes and over a hundred pennies. The robbers then requested more money and Mr. Maldonado gave them one ten-dollar bill out of his pocket. Mr. Maldonado testified that he then pulled out his gun and fired at the robbers. At

this time the robbers ran out of the store. The robbers dropped the shotgun as they ran. Mr. Maldonado testified that he immediately called the police. While waiting for the police to arrive, he went outside of his store where he recovered the shotgun the robbers had dropped in the snow. Approximately five to ten minutes later, the police officers arrived at the store. At that time he observed the three defendants seated in the squad car and he identified defendants Eaglin and Cage as the two men who had robbed him.

Felix Pantoja testified that on February 3, 1972, he was working in Mr. Maldonado's grocery store at 1658 W. Ohio Street, Chicago, Illinois, when two men entered the store and announced a holdup. While one man held a shotgun on them, the second man went over to the cash register and removed the money. The men then demanded more money and Mr. Maldonado gave them money out of his pocket. Mr. Maldonado pulled out his gun and took a shot at the robbers. The men ran out of the store and dropped the shotgun. Mr. Maldonado then called the police. While waiting for the police, Mr. Maldonado picked up the shotgun which was lying in the snow outside the door to his shop. Mr. Pantoja identified defendant Eaglin as the man who was holding the shotgun and defendant Cage as the man who took the money out of the register.

Chicago Police Officer William Rasch testified that on February 3, 1972, at approximately 8:30 P.M., he and his partner, Officer Scafivi, were on patrol in the area of Ashland (1600 West) and Grand Avenues, Chicago, Illinois, when they received a flash message of an armed robbery which had just occurred at 1658 W. Ohio (600 North). At that time they observed a white Chrysler going east on Ohio without headlights. Ohio is a one-way street going westbound. When they first observed the car, it was approximately one block from the scene of the robbery and was coming from the direction of the robbery. They proceeded to stop the vehicle,

which was being driven by defendant Eaglin, and defendants Cage and Forrest were seated in the car. The men were placed under arrest and a search of defendant Forrest disclosed that he had on his person one ten-dollar bill, three five-dollar bills, fifteen one-dollar bills, 42 quarters, one dime, 112 pennies and 27 nickels. The three defendants were placed in a police vehicle and taken back to the scene of the robbery, where Mr. Maldonado identified defendants Eaglin and Cage as the two men who had robbed him. Officer Rasch testified that Mr. Maldonado gave him a loaded, sawed-off shotgun which he said that the robbers had dropped.

Herman N. Cahan testified for the defense that he is a supervisor for the Cook County Department of Public Aid. His records show that defendant Forrest was given a public aid check for \$55.08 on January 17, 1972, and a second check for \$45.58 on January 26, 1972.

Defendant Nelson C. Forrest testified that on February 3, 1972, at approximately 6:30 P.M., Mack Cage and Norman Eaglin came to his home at 1333 Washburn, Chicago, Illinois. The three men played cards until 7:45 when they drove Forrest's wife and daughter to 111 N. Wood Street. The three men then decided to go down to Old Town. While en route to Old Town, they were stopped by police officers and placed under arrest. Forrest testified that the money he had on his person at the time he was placed under arrest was the result of the two public aid checks he had received and his winnings from the card game.

On cross-examination, Forrest testified that on the evening in question he was playing blackjack. However, upon further questioning he showed that he did not have any idea how the game of blackjack is played. Defendant Forrest also testified that Old Town is in the vicinity of Wells and Ohio Streets.

Defendants Norman Eaglin and Mack Cage testified that on

February 3, 1972, at approximately 6:30 P.M., they arrived at the home of Nelson Forrest to play cards. After playing black-jack for approximately an hour, they drove Forrest's wife and daughter to the home of the wife's mother in the area of Wood and Washington Streets, and then the three men decided to go to Old Town. On their way to Old Town they were stopped by Chicago police officers and placed under arrest.

Defendant Forrest argues that he was not proven guilty beyond a reasonable doubt because the evidence was insufficient to establish that he was accountable for the actions of his co-defendants. Section 5-2 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 5-2) provides that a person is legally accountable for the conduct of another when:

"(c) either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."

Where defendants have a common design to do an unlawful act, the act of any one of them done in furtherance of the common design is the act of all. People v. Jones, 12 Ill. App. 3d 643, 299 N.E. 2d 77. Proof of a common design need not be supported by words of agreement but can be drawn from the circumstances surrounding the commission of the act. People v. Richardson, 32 Ill. 2d 472, 207 N.E. 2d 478. While mere presence at the scene of a crime is insufficient to establish accountability (People v. Rudolph, 12 Ill. App. 3d 420, 299 N.E. 2d 129), proof that a person was present at the commission of the crime without disapproving or opposing the crime may be considered with other circumstances. People v. Hill, 39 Ill. 2d 125, 233 N.E. 2d 367.

In the case at bar, the testimony of the two eye-witnesses established that defendants Eaglin and Cage entered Mr. Maldonado's grocery store armed with a shotgun and announced a holdup. The men took currency and coins, the denominations and amounts of

which were testified to by Mr. Maldonado in detail. When Mr. Maldonado pulled a gun and shot at the robbers, they fled, dropping the shotgun. Mr. Maldonado immediately called the police. The testimony of Chicago Police Officer Rasch established that, upon getting the flash message of the armed robbery of Mr. Maldonado's store, he was approximately one block away. At that time he observed the three defendants in an automobile being driven by Eaglin proceeding the wrong way down a one-way street without headlights. He stopped the vehicle and a search of defendant Forrest disclosed that he had on his person one ten-dollar bill, three five-dollar bills, 15 one-dollar bills, 42 quarters, one dime, 27 nickels and 112 pennies. This corresponded with the denominations and substantially with the amounts of the currency and coins taken from Mr. Maldonado's store. All three men were returned to the scene of the crime where Mr. Maldonado identified defendants Eaglin and Cage as the men who had entered his store and robbed him and Mr. Pantoja identified Eaglin as the man who held the shotgun and Cage as the man who took the money. From the totality of these circumstances, the trier of fact could have reasonably found that defendant Forrest was not just an innocent bystander, but that he had lent his approval to the robbery by aiding and abetting in its commission. The evidence was sufficient to establish Forrest's guilt beyond a reasonable doubt.

Defendant Forrest also argues that his conviction was not based upon the strength of the State's case but upon the weakness of his alibi defense. He urges that he was effectively impeached by cross-examination at trial as to the matters of having been playing blackjack and of the location of Old Town, and that the jury found him guilty based upon this factor. Where a defendant elects to testify, he must tell a reasonable story or be judged by its improbabilities. People v. Morehead, 45 Ill.2d 326, 259 N.E.2d 8. The jury, sitting as trier of fact, was entitled to

disbelieve the defendant's trial testimony. Where, as in the case at bar, the evidence is sufficient to establish defendant's guilt beyond a reasonable doubt, the decision of the trier of fact will not be reversed.

Defendants Eaglin and Cage argue that the evidence was insufficient to establish their guilt beyond a reasonable doubt. This court has often stated the rule that it is the function of the jury as the trier of fact to determine the credibility of witnesses and the jury's finding will be disturbed only where the evidence is so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. People v. Hampton, 44 Ill. 2d 41, 253 N.E. 2d 385; People v. Sturgis, 14 Ill. App. 3d 181, 302 N.E. 2d 114. An identification by even one eye-witness to a crime is sufficient to justify a conviction if positive and credible, despite the fact that the defendant asserts an alibi defense. People v. Bennett, 9 Ill. App. 3d 1021, 293 N.E. 2d 687.

In the case at bar, Mr. Maldonado and Mr. Pantoja testified that on February 3, 1972, at approximately 8:30 P.M., defendants Eaglin and Cage entered Mr. Maldonado's grocery store armed with a shotgun and announced a robbery. While one defendant held the shotgun on them, the second defendant removed money from the cash register and from the person of Mr. Maldonado. When Mr. Maldonado produced a gun and fired a shot at the robbers, they fled. Mr. Maldonado identified defendants Eaglin and Cage when they were returned to the scene approximately ten minutes after the robbery, and Mr. Pantoja identified Eaglin as the man who held the shotgun and Cage as the man who took the money. Both witnesses described the lighting conditions in the store and their opportunity to observe the robbers. This court has held that the viewing of a defendant for a period of time, far less than in the case at bar, was sufficient to justify a conviction. People v. Wright, 10 Ill. App. 3d 1035, 295 N.E. 2d 510. Here,

the trier of fact found that the two eye-witnesses had a sufficient period of time to adequately identify the defendants so as to fix their identity. After a complete review of the record, we cannot say that the jury's determination was erroneous.

Defendants next argue that they were denied a fair trial when, in his opening and closing statements, the prosecutor on three occasions improperly argued facts not based upon the evidence and erroneously stated the law. An examination of the record demonstrates that the defendants did not object to any of the three comments. The error, therefore, if any, was waived. People v. Donald, 29 Ill. 2d 283, 194 N.E. 2d 227; People v. Weaver, 7 Ill. App. 3d 1104, 288 N.E. 2d 669.

Defendant Forrest also argues that the trial court erred in failing to give a jury instruction which included the second paragraph of I.P.I. Criminal 3.02 dealing with circumstantial evidence. A review of the record demonstrates that defendant Forrest did not tender such an instruction. Since he did not tender such an instruction, the trial court was under no duty to instruct the jury on its own motion. People v. Rudolph, 12 Ill. App. 3d 420, 299 N.E. 2d 129.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

NOV 6 1974
ASSOCIATION

3D
22 I.A. 678

No. 58488

PEOPLE OF THE STATE OF ILLINOIS,)
) APPEAL FROM CIRCUIT
) COURT OF COOK COUNTY.
Plaintiff-Appellee,)
)
vs.)
)
MICHAEL WILSON,) HONORABLE
) JOHN J. CROWLEY,
Defendant-Appellant.) PRESIDING.

Per Curiam: First District, Fifth Division.

Before Sullivan, P.J., Drucker and Lorenz, JJ.

Defendant was found guilty after a bench trial of the crime of theft in violation of Section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). He was placed on probation for a period of one year with the condition that the first six months be served in the House of Corrections.

Defendant appeals, arguing only that the complaint charging him with theft was fatally defective. Since defendant does not challenge the sufficiency of the evidence against him, a statement of the facts adduced at trial is not necessary. The complaint filed against defendant charged that he:

" . . . on or about 17 Aug. 72 at Cook County Ill. committed the offense of theft in that he knowingly obtained unauthorized control over property (to wit: wallet containing U.S.C.) of Jeff Green of the value of less than \$150.00 with the intent to permanently of the use and benefit of said property in violation of Chapter 38 Section 16 1 A 1 Illinois Revised Statute"

Defendant now argues that this complaint was fatally defective in that it failed to allege that he intended to permanently deprive the owner of the use and benefit of said property.

For a complaint or indictment to sufficiently state an offense it must inform the accused of the nature of the charge so as to enable him to prepare a defense and to serve as a bar to future prosecutions for the same offense. (People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) Niceties or strictness of pleading are

supported only where a defendant would be surprised at trial or be unable to meet the charge or prepare a defense. (People v. Greenwood, 115 Ill. App.2d 167, 253 N.E.2d 72.) A defect caused by a typographical error or clerical oversight in a complaint will not necessarily invalidate that complaint. People v. Parr, 130 Ill. App.2d 212, 264 N.E.2d 850.

In the case at bar a careful reading of the complaint demonstrates that the word "deprive" was inadvertently omitted after the word "permanently." This clerical error is not sufficient to invalidate the complaint. The complaint informed defendant that he was charged with the offense of theft in violation of Section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). It further advised defendant that the crime occurred on August 17, 1972, in Cook County, Illinois, and that he was charged with knowingly obtaining unauthorized control over a wallet containing U. S. currency of a value of less than \$150 belonging to Jeff Green. Defendant at trial was represented by privately retained counsel and did not challenge the validity of the complaint. On appeal defendant has failed to show how he was in any way prejudiced or hampered in the preparation of his defense. Under these circumstances, we conclude that the complaint was sufficient to apprise defendant as to the nature of the charge so as to enable him to prepare his defense and to serve as a bar to future prosecutions. The judgment is affirmed.

AFFIRMED.

Abstract only.



3D
22 I.A. 677

58487

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
WILLIAM CHAMBERS (IMPLEADED),	)	HONORABLE
	)	JOHN J. CROWLEY,
Defendant-Appellant.)	)	PRESIDING.

Per Curiam: First District, Fifth Division.

Before Sullivan, P.J., Drucker and Lorenz, JJ.

Defendant was found guilty of battery (Ill. Rev. Stat. 1971, ch. 38, par. 12-3) after a bench trial and was placed on probation for a period of one year on the condition that he first serve 30 days in the House of Correction. On appeal he contends that he was not proven guilty beyond a reasonable doubt and that the finding of the court below was inconsistent with the offense charged.

On the evening of August 17, 1972, Jeffery Green and Howard Kaner were beaten by a group of young men in the vicinity of the Cabrini-Green Homes in Chicago. They both filed separate battery and theft complaints against defendant. Green and Kaner also filed battery and theft complaints against Bookert Walls, Michael Wilson and Philip Moody. All complaints were tried together. Only defendant is involved in this appeal. At trial the following relevant evidence was adduced.

Jeff (Jeffery) Green testified for the State: At approximately 11:30 P.M. on August 17, 1972, he was at the corner of Rush and Division Streets in Chicago with his roommate, Howard Kaner, when they were approached by a juvenile on a bicycle who asked if they wished to purchase it. Green rode the bicycle a distance and decided to purchase it, but upon attempting to place it into Kaner's Chevy Nova automobile they found that it would not fit; the juvenile thereupon suggested that they put the bicycle into his 1965 Cadillac automobile parked about four blocks west on Division Street;

Green and Kaner drove to that location while the juvenile rode the bicycle, and it was found that the Cadillac would not start. The juvenile then suggested that they secure rope from the juvenile's home to tie the bicycle to the trunk of Kaner's vehicle, and the three proceeded as before to the Cabrini-Green housing project for that purpose, arriving there about 12:15 or 12:30 A.M. Upon arrival at the project, Kaner parked the car near a parking lot where the overhead lighting was "good, bright." The juvenile got off the bicycle, and another (unidentified) youth approached and rode off on the bicycle.

The juvenile then demanded money, but Green and Kaner refused, and a few minutes later a group of five to eight persons arrived. Defendant, who was identified by Green in court as one of the group, struck Green in the face with a belt or whip through the car window, resulting in welts and bruises to the face. At this time the first juvenile was in possession of Kaner's car keys and entered the vehicle while Green was seated in it. The "basis" of Green's attention was at that time directed toward the "dude" striking him with the belt, but he was also attempting to get the keys away from the juvenile. Green was "dragged" or "thrown" from the car and beaten by members of the group, including the defendant and Michael Wilson, and the car was "stripped" and "ripped up." Wilson had kicked Green in the ribs and was going through his pockets. Although Green did not know whether defendant had taken anything from him at the time, his wallet and cash were missing. The juvenile backed the Kaner vehicle into the parking lot; Kaner ran after the vehicle, and several of the group ran after Kaner. While the witness was being beaten, he was able to get away and summoned the police, giving them a description of the assailants. He returned to the scene with an officer where he observed the Kaner vehicle "taken apart" and several persons standing in a

corridor of a nearby building; Kaner at that time was in a second police vehicle. As the police arrived, the persons in the corridor began to disperse or disappear; defendant was in the group in the corridor. An interval of about 10 minutes had elapsed from the time Green had fled the scene until he identified persons at the building corridor while he was in the company of the police.

Defendant looked the same at the time of the incident as he did at the time of trial, and his hair looked the same "as far as I can remember." Defendant was the man beating him with a belt through the car window. Green had never seen his assailants before, and there was no conversation concerning drugs that evening.

Howard Kaner testified for the State: Kaner's testimony was essentially the same as that given by Green concerning the events preceding their arrival at the Cabrini-Green project. Upon arrival at the project Kaner stopped the Chevy Nova vehicle he was driving outside a parking lot under overhead lighting. Kaner then opened the trunk to the vehicle, saw it contained tires, and he determined that the bicycle would not fit. The last time he saw the car keys at that point was when he opened the trunk. After the unidentified youth rode off with the bicycle and the juvenile requested payment, the latter also questioned Green and Kaner concerning their possessions; Kaner had the impression that the juvenile was stalling, he and Green got back into their automobile to leave, and he observed that the juvenile then had the car keys; a group of youths had surrounded the car, among whom were Philip Moody and Bookert Walls. The group demanded their possessions, and Moody and Walls held Green and Kaner while their pockets were searched; he cannot say who went through their pockets. Walls and Moody were "kicking hell" out of Kaner, after which he was being dragged toward an apartment by persons he was unable to identify; he broke away from them and went for the police. The juvenile in the meantime had driven off in

Kaner's automobile. Green was surrounded by other persons, and Kaner had no idea where Green was at the time. When Kaner returned to the scene with the police, he identified three of the assailants from among six or seven who were then standing in a breezeway to a building. Green had already arrived at the building, and the police had two or three persons in custody who were not the persons who had beaten Kaner. The police interrogated the entire group, it was "like a group thing"; upon the arrival of the police at the scene, some of the group attempted to leave and were ordered to stop. There had been no conversation between Kaner and Green and the juvenile earlier that night concerning drugs. The juvenile was also placed under arrest.

The State then closed its case. Defense counsel moved that all complaints against defendant be dismissed. The court noted that Kaner gave no evidence against defendant. It thereupon granted counsel's motion with respect to all charges against defendant except Green's battery complaint.

Mary Chambers testified for defendant: She is defendant's wife and was playing cards with defendant, Wilson, Walls and Moody in the Chambers' apartment from 7:00 P.M. on the night in question until about midnight, at which time those five persons were leaving the building and heard a commotion; she then saw the complaining witnesses with the police, and the former were pointing out people, "He did it and he did it and he did it."

Angeline Davis testified for defendant: She was present in the Cabrini-Green area when Kaner and Green were bargaining with (juvenile) Johnny Johnson for his bicycle in return for marijuana. At that point about 10 or 15 youths arrived at the scene, none of whom was defendant, Moody, Walls or Wilson. That group of youths attacked Kaner and Green; the witness knew members of the group by sight but not by name. The first time she observed defendant and

the others named in the complaints was after the arrest, although she had known them prior to the date in question. She overheard Kaner state that he could not identify defendant while they were at the police station.

Arresting Officer Chana and defendant's father both testified that defendant's hair was totally black at the time he was arrested, whereas at the time of trial it contained a (red) streak.

Moody, Wilson and Walls testified in their own behalf and related the identical alibi as testified to by Mrs. Chambers, that they were playing cards in the Chambers' apartment until they descended the stairs and were arrested for the instant offenses. Officer Chana testified as a witness for defendant and the others and related that he arrested all concerned, and that Kaner identified Walls at the scene, while Green identified the other three men. A search of defendant and the other three men at the scene disclosed no property.

Opinion

Defendant's first contention that the State failed to prove his guilt beyond a reasonable doubt is bottomed upon his theory that Green allegedly misidentified defendant's hair color and upon his further theory that Green would have been unable to have observed his assailant while being beaten with the belt since Green at that time was struggling with the juvenile for the car keys.

Both matters raised by defendant were for resolution by the trial judge, as the trier of fact, who resolved both matters in favor of the State's position. Although Green had testified that "as far as I can remember" defendant's hair coloring was the same at trial as it was at the time of the incident, the court noted that Green's identification could have been based on defendant's "face, physique and other things" rather than just his hair style. Moreover, we note that defense counsel specifically argued the

question of hair coloring during his closing statement, and the court clearly gave little weight to that discrepancy.

As to the argument that Green had little opportunity to observe his assailant since he was preoccupied with the attempt to wrest the keys from the juvenile at the time he was being struck with the belt, defendant's counsel sought to establish such conclusion during his cross-examination of Green. The witness was nevertheless emphatic in his position that defendant was the person wielding the belt at that time. Green's identification of defendant as his assailant was clear and convincing and was unshaken on cross-examination; that evidence was sufficient, though contradicted, to have proven him guilty of the battery upon Green as charged in the complaint. People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385.

People v. Gold, 361 Ill. 23, 196 N.E. 729, cited by defendant, is not in point; the accused there was shown to have been 10 miles from the scene of the offense with which he was charged, while the eyewitness to the offense had only a "fleeting impression" of the assailant at the time of the offense.

Defendant also contends that the trial court's finding is inconsistent with the offense charged. This point is likewise without merit.

The complaint under which defendant was charged and convicted and the common law record recite that defendant committed a battery upon Jeff (Jeffery) Green; the trial court in reciting its finding of guilty stated, "[t]here is a finding of guilty on the battery offense against Mr. Kaner [sic]."

Although the common law record in a criminal case normally imports verity, the court on review will look to the entire record in a case where there exists a conflict between the common law record and the report of proceedings. (People v. Williams, 27 Ill. 2d 327, 189 N.E.2d 314.) From a consideration of the entire record

in this case it is evident that the trial court inadvertently stated that the finding of guilty was entered as to an offense against Howard Kaner, whereas it clearly appears that the court had intended that the finding was to have been entered as to the offense against Jeff Green.

The trial court had, at the close of the State's case-in-chief, sustained defendant's motion in dismissing Kaner's complaint against defendant. Immediately preceding the finding in question, the court commented that "the only count remaining against Mr. Chambers is the battery where the belt was involved. The court is persuaded that this offense took place at some time separate from the robbery situation. That was the reason why I made the finding that I did, on the motion." It is evident that the finding here was intended to be on the battery committed by defendant upon Jeff Green rather than upon Howard Kaner. It is also evident that defendant was in no manner prejudiced in this regard, nor may he in the future be subject again to jeopardy in this regard; the trial court's inadvertent designation becomes obvious when the entire record is considered.

People v. Johnson, 360 Ill. 605, 196 N.E. 805, cited by defendant, is not in point. Johnson involved a jury verdict containing language which enlarged the nature of the offense charged in the indictment, which the court on review held to be surplusage and therefore could be disregarded since it did not detract from the judgment itself.

For the foregoing reasons the judgment entered below is affirmed.

AFFIRMED.

Abstract only.



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22 I.A. 683

NO. 60146

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
JOSE GARCIA TORRES,)
)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY

HONORABLE
JAMES J. MEJDA,
PRESIDING.

PER CURIAM: First District, Fifth Division.

Before SULLIVAN, P.J., LORENZ and BARRETT, JJ.

Defendant was convicted of murder following a jury trial and, pursuant to the jury's recommendation, was sentenced to death. The conviction was affirmed by the Illinois Supreme Court, but the cause was remanded with directions to impose a sentence other than death. (People v. Torres, 54 Ill. 2d 384, 297 N.E.2d 142.) On remandment, after a hearing in aggravation and mitigation, the trial court imposed a sentence of not less than 50 years nor more than 150 years in the penitentiary. Defendant appeals contending that the sentence is excessive and should be reduced.

The record on this appeal consists only of matters pertaining to the hearing in aggravation and mitigation. As a result, this Court is uninformed of the facts upon which the jury recommended the death penalty. Further, the only facts set forth in the opinion of the Supreme Court (54 Ill. 2d 386.) are: "On February 27, 1967, at approximately 1 A.M., Patricia Heinen was stabbed to death while walking in downtown Chicago."

After the hearing in aggravation and mitigation, the trial court summarized the evidence, stated the reasons for his decision and sentenced the defendant, saying:

"This Court has previously presided over the trial of the case in which the finding of guilt was determined by a jury, it was the jury that made the recommendation that the death sentence be imposed, this Court followed the recommendation of the jury and did impose the death sentence relative to this case. It is now incumbent upon this Court to again consider this case from the standpoint of the order

entered by the Supreme Court of the State of Illinois in which the sentence previously entered was vacated and the matter was remanded to this court for the purpose of imposing a new sentence not inconsistent with the Supreme Court ruling and mandate.

* * *

A hearing has been heard [sic] pursuant to the statute in this matter in which the Court is called upon to consider the evidence heard in the original trial of this proceedings, counsel has briefly summarized some of the factual matters which were placed before the Court and the jury in the original trial of this matter, and the facts as related involve the death of a young lady on the streets of Chicago by a stabbing, by which three stab wounds were inflicted resulting in the death of the young lady. The young lady had been employed in the downtown area of Chicago and had left her place of employment and was walking on the streets in the lighted areas of the city of Chicago, on the public streets of the downtown areas which are frequently travelled and walked upon during the late hours of the evening with a certain satisfaction and concurrence in ideas that people should be able to walk upon the streets of the city in safety and with a proper regard to their own protection. Unfortunately this particular incident transpired and the facts before this Court are that a young lady had been stabbed, had been murdered, the Court feels that it is a very serious offense, murder being one of the most serious offenses set forth in our statute that is punishable [sic] by the Court.

The Court has also had an opportunity to review the pre-sentence report which was prepared by the Probation Department of the court, and the Court has reviewed the factual matters therein set forth. The Court has also had the advantage and the opportunity of additional hearing involving testimony of members of the family of the defendant, including the defendant himself as to various matters which have transpired since the occurrence and since the previous sentence imposed herein. Counsel have had an opportunity to argue the sentencing alternatives which are open to the Court.

* * *

The pre-sentence report shows a young man who had been brought up in Texas, who had been given limited opportunities at school, who attended school to about the third grade and who had left school sometime during the ages of 12 or 15 and who has learned to read and write to a certain extent while incarcerated as a result of the occurrence in this matter. The Court has read the report insofar as it relates to the family of the defendant, the economic situation, the work record of the defendant, the social conditions and all other matters which are enumerated and set forth in the report.

A certain incident occurred since the time that the original sentence was imposed in which the defendant received a sentence while awaiting shipment to the diagnostic department of Joliet.

The Court has the responsibility that counsel have talked about, the deterrence of crime insofar as is humanly possible by any man-made laws, by any man-made determinations or any man-made rules and regulations that might otherwise be imposed. Certainly if we did not have proper sentences, if we did not have proper dispositions to be made for these crimes, without question, which are more serious than other crimes we have on our books, we would be a lawless society in which people would do what they would with certain impunity, with no reaction by society they would be immune to any punishment that might be imposed. It is true it is the purpose of any sentence to be imposed by this Court to impose punishment for the crime that actually occurred and also the purpose of sentence is to provide a deterrent to anyone else who might be prepared to commit such a crime as occurred in this instance or undertake such a crime. The extent of the sentence that the Court imposes is intended to safeguard the community and also to try to look into the future of this man as to what the future may hold for him. He had availed himself of certain learnings and certain trainings made available to him in a very limited way in the past.

It is also to be noted any time he has spent awaiting trial in this matter will be credited against any sentence to be imposed at this time.

So therefore, the Court must take into consideration those matters that have occurred while he has been incarcerated as a result of this crime as well as what may occur in the future under any incarceration that the Court may order, bearing in mind all of the factors I have previously alluded to and the fact particularly that under our laws the parole system as well as the power of commutation exists to provide certain relief to individuals who have proven themselves by past conduct, who deserve a reduction of any sentence imposed by this Court, or reduction of any sentence that remains to be served under that particular sentence, the Court has considered the arguments of counsel with reference to the type of sentence that might be deemed appropriate, by the prosecution on one hand and the defense on one hand, and at this time the Court is prepared to pass sentence unless either of counsel or the defendant have anything further to say to the Court. Is there anything further to be stated to the Court at this point?

MR. SAMUELS: No, your Honor.

THE COURT: If not the defendant will please rise and come forward for the purpose of sentencing.

Mr. Torres, is there anything further that you wish to say before the Court passes sentence at this time?

DEFENDANT TORRES: No.

THE COURT: Mr. Torres, the Court hereby sentences you to a term of years not less than 50 and not more than 150 years for which period of time you will be committed to the Department of Corrections of the State of Illinois. You will be taken from here and transferred to the Department of Corrections for incarceration in the institution they so designate for that purpose. The Court will order that a mittimus issue and judgment will be entered, and mittimus will issue for the purpose of executing the sentence of this court."

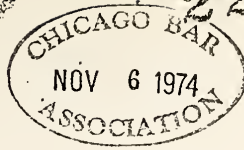
It is well established that where defendant claims the sentence imposed upon him is excessive, although within the limits prescribed by the legislature in the Criminal Code (Ill. Rev. Stat. 1965, ch. 38, par. 9-1(b)), the "sentence should not be disturbed unless it is greatly at variance with the purpose and spirit of the law or manifestly in excess of the proscriptions of section 11 of article II of the Illinois constitution [1870]." (People v. Sorinkle, 56 Ill. 2d 257, 264, 307 N.E.2d 161, 164.) The imposition of a sentence is a matter of judicial discretion and the sentence imposed by the trial court should not be altered by a reviewing court unless it is apparent that the judge abused his discretion. (People v. Burbank, 53 Ill. 2d 261, 275, 291 N.E.2d 161, 169; see also People v. Wilson, 12 Ill. App. 3d 59, 64, 297 N.E.2d 790, 794.) The trial court is normally in a better position during the trial and the hearing in aggravation and mitigation to make a sound determination as to the punishment to be imposed than are courts of review.

In the case at bar, the sentence was within the limits proscribed by the legislature. (Ill. Rev. Stat. 1965, ch. 38, par. 9-1(b).) The judge who presided at the trial when the jury recommended the death penalty also presided at the hearing in aggravation and mitigation. He was in the best position to determine what sentence was appropriate. On this record, we cannot say that he abused his discretion.

The judgment of the circuit court is affirmed.

Affirmed.

No. 60014



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
)	
RONALD MURRAY, also known as	)	HONORABLE
RONALD ESQUER,	)	DAVID CERDA,
Defendant-Appellant.	)	JUDGE PRESIDING.

Per Curiam: First District, Second Division.

Before Stamos, J., Leighton, J., and Downing, J.

Defendant, Ronald Murray, also known as Ronald Esquer, was charged with the offense of theft in violation of Section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). After a bench trial, the defendant was found guilty and sentenced to ten days in the House of Correction. The defendant appealed.

The Public Defender has filed a motion for leave to withdraw, supported by a brief, pursuant to Anders v. California, 386 U.S. 738, in which he alleges that the only ground for appeal is whether the State's single complaining witness proved the defendant guilty beyond a reasonable doubt, even though the testimony is contradicted by the defendant.

The defendant was served with copies of the motion and brief and was given time within which to file any points he might choose in support of the appeal. The defendant has filed no response.

The sole issue on appeal is whether the defendant was proved guilty of theft beyond a reasonable doubt.

At the trial, Dorothy Morgan testified that on December 9, 1973, while working as a security guard for the Community Discount Center, 3161 North Clark Street, Chicago, Illinois, she observed the defendant, who was in the men's department,

put on a jacket, remove the ticket therefrom, and walk from the men's department, towards the exit doors and leave the store. Although the defendant passed a checkout counter, he made no attempt to pay for the jacket. Ms. Morgan, who was accompanied by a store guard, walked up to the defendant, showed him her badge and asked him to come back to the store. The defendant refused, saying that it was his jacket. The defendant was taken to the security office, where he admitted he took the jacket, saying, "I was wrong in not paying for the jacket." Ms. Morgan identified the jacket and said that the Community Discount Center was the owner.

The defendant testified that the jacket was a size 42 and that he wears a size 38. He tried on the jacket and was going over to the desk to ask if they had a size 38 when Ms. Morgan came up to him, showed her badge and asked him to come with her to the security office, which he did. Defendant said he did not intend to steal the jacket.

Ms. Morgan stated that Community Discount Center is a corporation and licensed to do business in the State of Illinois.

The law is well settled that the uncorroborated testimony of a single witness is sufficient to convict if the testimony is positive and the witness credible, although contradicted by the defendant. People v. Cato, 4 Ill. App. 3d 1093, 1095, 283 N.E.2d 259; People v. Solomon, 24 Ill. 2d 586, 591, 182 N.E. 2d 736, certiorari denied 371 U.S. 853; People v. Sullivan, 46 Ill. 2d 399, 401, 263 N.E.2d 38.

Here, the record indicates that the State proved all the material elements of the offense of theft under Section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a)(1)). The record also shows a positive identification of the defendant as the individual who committed the theft.

In a bench trial it is the responsibility of the trial judge to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial judge will not be disturbed. People v. Catlett, 48 Ill. 2d 56, 268 N.E. 2d 378; People v. Bracey, 129 Ill. App. 2d 57, 262 N.E.2d 748; People v. Brown, 14 Ill. App. 3d 242, 302 N.E.2d 161.

In the case at bar, the trial court chose to believe the testimony of the State's witness and it cannot be said that determination was erroneous (People v. Benedik, 56 Ill. 2d 306, 310, 307 N.E.2d 382). The evidence was more than sufficient for the trial court to determine that the defendant took unauthorized control over the jacket with the intent to permanently deprive the Community Discount Center, the owner, of the use and benefit thereof.

Our inspection of the record does not disclose any additional possible grounds for appeal. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel for the defendant on appeal, and the judgment of the circuit court of Cook County is affirmed.

Motion allowed;

Judgment affirmed.

(Publish abstract only.)



60051

PEOPLE OF THE STATE OF ILLINOIS, )	)	APPEAL FROM THE
Plaintiff-Appellee, )	)	CIRCUIT COURT OF
vs. )	)	COOK COUNTY
ISAAC ADAMS, )	)	HON. FRANK J. WILSON
Defendant-Appellant. )	)	Presiding

* PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Isaac Adams, hereinafter called petitioner, appeals from the dismissal without an evidentiary hearing of his post-conviction petition, filed pursuant to the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, art. 122). The defendant on appeal contends that the trial court erred when it dismissed his post-conviction petition without an evidentiary hearing on four specific points, hereinafter set out.

The petitioner was found guilty of murder and aggravated battery by a jury and sentenced to a term of not less than 75 years nor more than 100 years for murder and not less than 5 years nor more than 10 years for aggravated battery, the sentences to run concurrently. On direct appeal the judgments were affirmed but the sentence for murder was reduced to a term of not less than 40 years nor more than 100 years. People v. Adams, 8 Ill. App. 3d 8, 288 N.E.2d 724.

The petitioner, by private counsel, then filed a post-conviction petition in which it was contended that the defendant's constitutional rights were violated in the following respects:

* EGAN, P.J. did not participate

1. That the petitioner was denied effective assistance of both trial and appellate counsel.

2. That the State presented evidence to the jury that the petitioner relied on his constitutional right to remain silent.

3. That the State introduced evidence which was obtained in an illegal search and seizure.

4. That the identification of the petitioner was the result of an unconstitutionally suggestive identification procedure.

On October 18, 1973, a hearing was held on the post-conviction petition and the motion to dismiss filed thereto. The trial judge sustained the motion to dismiss and denied the prayer of the petition, stating that in his opinion trial counsel was not incompetent, that counsel had "a perfect right to evaluate the facts and circumstances as to whether he should file a motion to suppress evidence," and that "he did not do it, and I think he is capable."

The facts leading to the trial, conviction and sentencing of Isaac Adams for murder and aggravated battery are set forth in People v. Adams, 8 Ill. App. 3d 8, 288 N.E.2d 724, as follows:

"On June 19, 1970, the decedent was found shot to death in the front seat of his automobile. His auto had crashed into a parked car. Miss Verna White was wounded in the same incident.

"Verna White testified for the State that, as she stood at a street corner in Chicago, the decedent drove up and asked if she were a prostitute. She replied affirmatively, agreed to perform an act of prostitution, and they drove to a nearby alley. As she prepared to perform an act of oral copulation, two men approached the car. She and the deceased tried to hide, but the two men came to opposite sides of the car. The man on her side opened the car door, and she recognized the defendant, although

at the time she did not know his name. Defendant, holding a gun, attempted to enter the car and ordered the witness to move over. Miss White did not move, and the deceased started the car and attempted to drive away. Defendant fired at least five shots at the witness and at the deceased. Miss White was shot twice, in the thigh and in the calf. As he drove away, the deceased said that he was shot and told the witness to get out. She was unable to do so because of the speed of his car until he ran into the parked car.

"Miss White ran back to the original intersection where three friends, Charles, James and Ann Hicks, were waiting for her. The Hicks' drove her back to the decedent's car, where the witness saw him slumped over the wheel, motionless and bloody. The Hicks' then took her to get medical attention for her injuries. They stopped a police car, and were directed to a nearby hospital. Miss White first told the police at the hospital that she had been shot by some 'dudes' who attacked her. After the police told her that she could be in trouble unless she told the truth, the witness told them what had happened. Miss White further testified that the second statement was the truth except for one thing. She told the police that she knew the deceased before that night, but she did not. She did not tell the police that she was a prostitute.

"Miss White testified that she recognized defendant as someone she had seen in the neighborhood for about a year. He also frequented the same beauty parlor as she. He had a hair process and heavy mustache. His hair was not processed at trial. She stated that she had a good opportunity to see the defendant. There was an overhead light in the alley and, after he opened the car door, the interior lights of the car were on. The witness saw defendant on the street a few hours before the assault, and he had said: 'Bitch, I am going to get you.' After viewing photographs, she identified defendant as her assailant and the person who had killed the deceased.

"Officer Ralph Storck of the Chicago Police Department testified that after viewing over 200 photographs, the victim identified defendant as her assailant. Miss White informed the officer that defendant wore black clothes and had a scarf on his head at the time of the occurrence. At about 10:00 A.M. on June 19, 1970, Officer Storck, along with other officers, went to defendant's apartment, located a few blocks from the scene of the shooting. The police woke defendant up and arrested him, finding an automatic pistol in the mattress of the bed upon which he was sleeping.

The gun was partially disassembled, but it was of the same caliber as the bullet recovered from the deceased's body. An expended casing of the same caliber was found in the alley at the scene of the shooting. After making the arrest, the police found a scarf in defendant's jacket pocket. Officer Storck further testified that Miss White described her assailant as being small, 5'4" to 5'6", 18 to 20 years, and having processed hair and a mustache. The officer noticed that at the time of the arrest defendant's hair was processed and that he had a mustache.

"At trial, Miss White described the weapon held by defendant as a small, gray automatic pistol. She identified the gun recovered from defendant's mattress as the gun used by defendant in committing the crimes.

"Jeannette Johnson, defendant's girl friend, testified for the defense that she was with defendant earlier on the evening in question. He was wearing green slacks, and did not have a scarf on his head.

"Defendant's mother and two brothers, Michael and Myron, testified that defendant came home about 10:00 P.M., June 18, 1970. He went to sleep at about 10:30 P.M., and was still sleeping at 7:30 A.M. the following morning. Michael Adams, 14 years old, also testified that the gun in question belonged to him, not to defendant; that the gun was in the mattress for about 60 days; and that, although defendant slept right on top of it, Michael never mentioned its presence to defendant."

On direct appeal the petitioner contended that he was not proved guilty of the crimes beyond a reasonable doubt; that he was denied a fair trial as a result of certain remarks made by the prosecutor in the closing argument; and that the sentence imposed for murder was excessive. People v. Adams, 8 Ill. App. 3d 8, 12-13.

In the present appeal the petitioner argues that trial counsel's failure to file a motion to suppress the gun which the police found under the mattress upon which the petitioner was sleeping at the time of his arrest was due to incompetency and

not trial strategy. The State argues that trial counsel cannot be branded as incompetent for merely exercising his judgment in conducting the trial in a manner he believed would be most strategically propitious for the petitioner.

The law is clear that the petitioner is not entitled to an evidentiary hearing as a matter of right, since the dismissal of a non-meritorious petition on motion is within the contemplation of the Post-Conviction Act and is necessary to the orderly and expeditious disposition of such a petition. (People v. Collins, 39 Ill. 2d 286, 235 N.E.2d 570; People v. Funches, 9 Ill. App. 3d 372, 292 N.E.2d 187; People v. Payne, 16 Ill. App. 3d 83, 305 N.E.2d 700.) Further, the trial court may render its decision on the basis of what is contained in the pleading to which the motion is directed, as well as the transcript of the trial or other proceedings. People v. Morris, 43 Ill. 2d 124, 251 N.E.2d 202; People v. Payne, 16 Ill. App. 3d 83, 305 N.E.2d 700.

On direct appeal the petitioner relied on an alibi defense to the effect that the petitioner was home and in bed sleeping during the time the murder took place. Also, the petitioner presented the evidence of his brother, Michael Adams, that he found the gun; that he had placed the gun under the mattress; and that he had not told his brother, the petitioner, about the gun. In light of this testimony and the defense raised, it would not have been expedient for trial counsel to make a motion to suppress the physical evidence.

The failure of appointed trial counsel to file a motion to suppress the physical evidence has been held insufficient

to show incompetency of counsel unless the petitioner has shown by the allegations of the post-conviction petition and supporting documents that substantial prejudice resulted therefrom, without which the outcome would probably have been different. (People v. Harter, 4 Ill. App. 3d 772, 282 N.E.2d 10; People v. Stepheny, 46 Ill. 2d 153, 263 N.E.2d 83; People v. Lynch, 11 Ill. App. 3d 479, 297 N.E.2d 382.) This the petitioner failed to do in the case at bar. Also see People v. Pierce, Illinois Appellate Court, First District, General No. 59868, Fifth Division, Opinion filed July 12, 1974, where the court held that defense counsel was not incompetent for failure to file a petition for rehearing in the Illinois Supreme Court.

In the instant case, there were no affidavits or supporting documents to support the petitioner's allegations that appointed trial counsel was incompetent in not filing a motion to suppress the gun; or that if such a motion was filed the outcome would probably have been different. Under such circumstances, the trial court did not err in refusing to hold an evidentiary hearing on this issue.

The petitioner, relying upon the case of Chimel v. California, 395 U.S. 752, 23 L.Ed. 685, 89 Sup. Ct. 2034, argues that at the time of the arrest and search the petitioner "had been removed from the area of the bed," where the gun was hidden, so that "there was no need to search in order to protect the officers." The petitioner does not argue that the search and seizure were illegal, but contends that because the State filed a motion to dismiss, the petitioner is entitled to an evidentiary hearing. However, the trial court

specifically found that trial counsel was not incompetent by failing to file a motion to suppress and, therefore, the petitioner was not entitled to an evidentiary hearing as a matter of right. Where the petition is non-meritorious on its face, the trial court may dismiss the post-conviction petition without an evidentiary hearing. People v. Funches, 9 Ill. App. 3d 372, 292 N.E.2d 187; People v. Collins, 39 Ill. 2d 286, 235 N.E.2d 570.

In the case at bar, the record shows that the police officers were informed that petitioner had shot and killed a man and, therefore, they were justified in searching under the mattress on which the petitioner had been lying. People v. Perry, 47 Ill. 2d 402, 266 N.E.2d 330; United States v. Williams, 454 F.2d 1016.

The record shows that the search by the police officers of the mattress and the discovery of the gun thereunder did not violate any of petitioner's constitutional rights and, therefore, the trial court rightfully dismissed the post-conviction petition without holding an evidentiary hearing on that issue.

The petitioner contends that although appellate counsel argued the petitioner was not proven guilty beyond a reasonable doubt, it was done in such an ineffective manner as to deny petitioner effective assistance of appellate counsel. Petitioner's present counsel suggests numerous arguments which could have been made on behalf of the petitioner on direct appeal. However, a comparison of these arguments with those made on direct appeal discloses that most of the arguments are substantially the same as those presented on direct appeal.

The only additional factor contained in petitioner's present suggested argument is that Verna White's identification of the petitioner as the murderer was questionable. However, the record clearly shows that an attack on the identification of the petitioner by Miss White would prove futile because she was able to pick the petitioner's photograph out of approximately 200 photographs shown to her. Further, Miss White had seen the petitioner earlier in the evening of the murder, as well as 10 to 15 times prior thereto, sometimes at the House of Freddy, a beauty shop which they both patronized. Therefore, appellate counsel's decision not to attack the identification of the petitioner by Miss White in the "reasonable doubt argument" does not indicate incompetency on his part. Furthermore, the opinion of the Appellate Court clearly indicates that the court fully considered the credibility of Miss White, as well as her identification of the petitioner, and concluded that the petitioner's guilt was proven beyond a reasonable doubt. (People v. Adams, 8 Ill. App. 3d 8, 12, 288 N.E.2d 724.) In light of the foregoing, the petitioner is now barred by the doctrine of res judicata from raising this argument by way of a post-conviction petition. People v. Frank, 48 Ill. 2d 500, 272 N.E.2d 25; People v. Walker, 6 Ill. App. 3d 909, 286 N.E.2d 812; People v. Westbrook, 5 Ill. App. 3d 970, 284 N.E.2d 695.

Since there is no evidence of incompetency on the part of appellate counsel in raising the reasonable doubt argument on direct appeal, the trial court did not err in dismissing the petition without an evidentiary hearing on this issue.

The petitioner further argues he was denied a fair trial because the jury was informed that upon petitioner's arrest he was advised of his right to remain silent. The basis of petitioner's argument is that the jury could infer that the petitioner did not make any statement after being advised of his rights. Petitioner urges that this procedure of itself violated his Fifth Amendment or Miranda (Miranda v. Arizona, 384 U.S. 436) rights. This is contrary to the record. There is no testimony that the petitioner requested a lawyer or stated that he wanted to remain silent or that he made a statement to the police. There is no reason to believe that the jury reached such an assumption. It is therefore apparent that the petitioner's Fifth Amendment or Miranda rights were not violated. Even if it be assumed that the petitioner was not effectively apprised of his constitutional rights after his arrest but before interrogation, there is nothing in the record to show that the petitioner was harmed or prejudiced by the alleged violation and, therefore, "a failure to comply fully with Miranda can be classified as harmless error." People v. Kaprelian, 6 Ill. App. 3d 1066, 286 N.E.2d 613, petition for leave to appeal denied, 52 Ill. 2d 598, certiorari denied 412 U.S. 918.

Further, there was no obligation of appellate counsel to brief every conceivable issue on appeal. Therefore, it was not incompetency for counsel to refrain from raising those issues which in his judgment were without merit, unless his appraisal of the merits was patently wrong. People v. Frank, 48 Ill. 2d 500, 505, 272 N.E.2d 25; People v. Blewett, 11 Ill. App. 3d 1051, 1056, 298 N.E.2d 366.

It is apparent that appellate counsel was not incompetent for failure to argue on direct appeal that petitioner's Fifth Amendment or Miranda rights had been violated.

Finally, petitioner argues that it was incompetent of both trial counsel and appellate counsel not to have raised the issue of suggestive identification. However, the petitioner states that he was not asking "this court to hold from the instant record that a suggestive procedure occurred," because such determination can be made only after a full and complete evidentiary hearing on the issue. This court is bound by the record now on appeal and since the petitioner concedes that the record does not disclose a suggestive identification procedure, this issue should not be considered. People v. Pierce, 48 Ill. 2d 48, 268 N.E.2d 373; People v. Westbrook, 5 Ill. App. 3d 970, 284 N.E.2d 695; People v. Funches, 9 Ill. App. 3d 372, 292 N.E.2d 187; People v. Spicer, 47 Ill. 2d 114, 264 N.E.2d 181.

Further, the record shows that the identification of the petitioner was not the result of a suggestive procedure. Verna White testified that a short time prior to the shooting she had seen the petitioner and had a brief conversation with him, but that she did not know his name; that she had seen him 10 or 15 times before; and that she had seen him a few times at the House of Freddy, a beauty shop which they both patronized. After the shooting Miss White was taken to a police station, where she looked at approximately 200 photographs from which she identified petitioner. The petitioner was then arrested and brought to the police station, where he was shown to Miss White, who identified him as the assailant. The individual

confrontation at the police station neither suggested nor induced the petitioner's identification by Miss White. (People v. Newsum, 98 Ill. App. 2d 219, 240 N.E.2d 780.) Furthermore, an in-court identification is not tainted by an allegedly illegal confrontation when an independent basis exists for the in-court identification. (People v. Blumenshine, 42 Ill. 2d 508, 250 N.E.2d 152; People v. Martin, 47 Ill. 2d 331, 265 N.E.2d 685.) In the case at bar there is nothing in the record to indicate that the positive in-court identification was tainted by the allegedly improper showup. (People v. Blewett, 11 Ill. App. 3d 1051, 298 N.E.2d 366.) Therefore, counsel's failure to raise this issue in the trial court or on direct appeal does not show that counsel was incompetent. The post-conviction petition was properly dismissed by the trial court without an evidentiary hearing on this issue.

A careful review of the record discloses that the asserted errors of trial counsel and appellate counsel on direct review concerned matters of judgment, as to which counsel should be allowed generous leeway, since the decision may represent only a tactical maneuver in a more comprehensive strategy. An attorney's performance should not be measured by what petitioner's present counsel, with hindsight, might estimate to have been the better course. People v. Tripp, 19 Ill. App. 3d 200, 205, 311 N.E.2d 168; People v. Washington, 41 Ill. 2d 16, 241 N.E.2d 425.

There is no reversible error in the record and, therefore, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

NO. 58951



3D
221.A. 719
APPEAL FROM
CIRCUIT COURT
COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)

vs.)

MARIO TOMASO TRIPKOVICH,)
)
Defendant-Appellant.)

HONORABLE
SAUL A. EPTON,
PRESIDING.

Per Curiam: First District, Second Division.

Before Hayes, P.J., Stamos and Leighton, JJ.

Mario Tomaso Tripkovich (defendant) was found guilty after a jury trial of the offenses of murder and burglary, in violation of sections 9-1 and 19-1 of the Criminal Code, and sentenced to terms of 30 years to 60 years on the murder conviction, and five years to ten years on the burglary conviction. (Ill. Rev. Stat. 1967, ch. 38, pars. 9-1 and 19-1.) On the direct appeal from that judgment, this Court vacated the judgment of conviction of murder and remanded the cause with directions to hold a hearing on the question of whether the alleged confession made by defendant at the scene of the incident was voluntarily made: People v. Tripkovich, 6 Ill. App. 3d 37, 284 N.E. 2d 323.

On remand the trial court, after a hearing, denied defendant's motion to suppress the confession and reinstated the judgment theretofore entered. Defendant now appeals from that order of denial and reinstatement, contending that the trial court improperly held that it was unnecessary that he have been advised of his constitutional rights prior to police questioning, and that the trial court should have required the State to have produced all material witnesses to the alleged confession or to have accounted for its failure to do so.

Defendant was found guilty of the burglary of the

Waveland Golf Course restaurant in Chicago and of the murder of the night watchman of that establishment, the offenses taking place at approximately 5:00 A.M. on August 14, 1969. The caretaker of the golf course clubhouse observed defendant inside the restaurant attempting to open drawers with a meat cleaver and notified the police. Two police officers arrived shortly and the caretaker accompanied them to the restaurant, where the officers confronted defendant; defendant is then alleged to have made the statement here in question.

In remanding the cause to the trial court for a hearing on the question of whether the statement in question was voluntarily made by defendant, we stated that, if the testimony elicited from the caretaker and the two police officers was the same at the hearing as that which had been elicited from them at the trial and if the trial court determined that such statement by defendant was voluntary, then it would not have been necessary for the officers to have advised defendant of his constitutional rights prior thereto, since the statement was not the product of a custodial interrogation.

The testimony of the officers at trial was that, upon entry into the restaurant and after telling defendant to come forward with his hands raised, the night watchman was observed lying on a cot with blood around his head and one of the officers asked defendant, "What happened to him?", to which defendant replied that the watchman woke up and he had to hit him. A comparison of the testimony which had been elicited from those witnesses at the trial and that which was elicited at the hearing below, discloses that the testimony was identical, with the single exception that the caretaker noted that defendant was asked the question and gave his response after having been handcuffed and searched, whereas

the officers stated, consistently with their trial testimony, that the question and the answer occurred as they were entering the establishment and approaching the defendant. The "conflict" which exists in the evidence to that extent was obviated by the testimony of the caretaker that he was not in a position to have overheard all that was spoken between the officers and defendant, and by the finding of the trial court that, in light of that admission, there existed no conflict in the evidence. We hold that the evidence adduced at the hearing on the remandment of the case was substantially the same as that adduced at the trial of the cause on the question of the circumstances surrounding defendant's statement; that such evidence discloses that the statement was voluntary; and that it was unnecessary for the police, under the circumstances, to have advised the defendant of his constitutional rights pursuant to Miranda v. Arizona, 384 U.S. 436.

The case of People v. Bailey, 15 Ill. App. 3d 558, 304 N.E. 2d 668, cited by defendant for the standards to be applied in a determination whether there has been a custodial interrogation of a person not formally charged or arrested, is not in point. In Bailey, as here, the police had just arrived on the scene, had no knowledge of the facts of the case and were about to commence upon a routine investigation when the challenged statement was made by defendant in response to "general, on-the-scene questioning" by the officers as to what had occurred, which the "holding in Miranda was not intended to restrict." (Bailey, supra, at p. 562). The Bailey case supports the State's position in this regard rather than that of the defendant.

The additional point raised by defendant is likewise without merit: that the State failed to produce all witnesses

to the statement and did not otherwise account for its failure to do so. No objection was raised below in this regard. The record further discloses that the only persons clearly shown to have been in the immediate area at the time of defendant's statement were the two police officers and the caretaker; although there was testimony that numerous other police officers were at the scene, the evidence is equivocal whether they were present at the time the statement was made, whether they were within the immediate area of the statement, whether they had any direct connection with defendant and whether any of them had heard the statement made by defendant. Under the circumstances, it was not necessary for the State to have produced, or otherwise accounted for, such witnesses, if in fact there were any. People v. Lego, 32 Ill. 2d 76, 80, 203 N.E. 2d 875.

The trial court properly denied defendant's motion to suppress the confession and properly ordered reinstatement of the judgment of conviction theretofore entered. For these reasons the judgment is affirmed.

Judgment affirmed.

Publish abstract only.

No. 58862



3D
221.A. 720

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
WALTER SZYMANSKI,	)	MARVIN E. ASPEN,
	)	PRESIDING.
Defendant-Appellant.)	

Before McNAMARA, P.J., DEMPSEY and MEJDA, JJ.

PER CURIAM:

Walter Szymanski, defendant, was found guilty after a bench trial of the crime of gambling (Ill.Rev.Stat. 1971, ch.38, par. 28-1(a)(5)). He was sentenced to a term of four months in the Cook County jail and fined \$500. Defendant appeals, arguing that the trial court erred in failing to grant his motion to quash the search warrant and suppress evidence and that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At the motion to suppress and at trial the following evidence was adduced. Clifford Berti, a Chicago police officer, testified that he drew up the search warrant and complaint for search warrant. On July 16, 1971, at approximately 2:00 p.m., together with three other police officers, he proceeded to 2319 West Grenshaw, Chicago, to execute the search warrant. The house at that address is a one-story brick bungalow. Officer Berti testified that he knocked on the door and announced his office, but did not receive any response. Thereafter, he entered the first floor of the premises, which consisted of five rooms. In one of the bedrooms, Berti found a telephone with a listed number which had been stated in the search warrant. Berti lifted the receiver and heard voices. He then replaced the receiver and followed the telephone wires down to the basement. Officer Berti testified that he found a wooden door which led down to the basement. He walked down the stairs and as he reached the bottom of the stairs, he observed the defendant seated at a table six or seven feet from the stairway. The defendant was talking on the telephone and had a pen in his hand.

Upon seeing the officer, the defendant hung up the phone. Officer Berti testified that on the table in front of the defendant there was an Illinois Sports News scratch sheet and several pieces of paper which Berti identified as being the records of wagers on horse races.

Hector Garcia testified that on July 16, 1971, he lived at 2319 West Grenshaw, Chicago, Illinois. The house at that address is a bungalow, with a first floor and a basement. The basement is divided into two parts. There is an apartment in the front of the basement with an entrance at the rear of the basement. The rear part of the basement is used by the Garcia family. Garcia testified that the basement apartment was rented to a man other than the defendant for a rent of \$25 per week by his brother, William Garcia. The basement apartment does not have a number or a mailbox. Mr. Garcia testified that he had a telephone on the first floor with an extension phone in the basement. The telephone is listed in the name of William Garcia.

Defendant contends that the trial court erred in failing to grant his motion to quash the search warrant and suppress evidence. First, the defendant argues that the police officers had no right to search the basement apartment. Defendant reasons that since the search warrant commanded the officers to search a house at 2319 West Grenshaw and the record shows that the structure at that address was both a house and an apartment, the warrant was too broad and the police officers were unjustified in searching the basement apartment.

Here the search warrant called for the police officers to search 2319 West Grenshaw, "a house." The evidence clearly showed that the structure at that address was a single family type bungalow. The police officer testified that from the outside the house appeared to be a one-story single family dwelling. Hector Garcia, the owner of the premises, described them as a one-story bungalow with a basement. Although there

was testimony that part of the basement was rented to a third person, there is nothing which would identify the alleged basement apartment as a separate unit. There were only two entrances to the building, one at the front and one at the rear, as in any single family home. The basement apartment had no separate entrance, other than that common to the house, and had no separate street address or mailbox. To all outward appearances the building was a single family dwelling. Defendant has failed to point to anything which would put the officers on notice that there was a separate apartment in the basement.

U. S. v. Poppitt (1964), 227 F. Supp. 73.

Officer Berti testified that he entered the first floor of the house, which had five rooms. In searching one of the bedrooms, he found a telephone with the number stated in the complaint for search warrant. After hearing voices on the telephone, Berti followed the telephone line to an extension phone in the basement. He went through a door on the first floor, down a flight of stairs and immediately observed the defendant seated at a table. There was nothing to prohibit entry from the basement to the other parts of the home. The evidence also demonstrated that the Garcia family used the rear of the basement for their personal use. Here the description in the search warrant was in accord with the outward appearance of the structure. The police officers had reasonable grounds to believe the premises were all one unit and in executing the search warrant the officers properly searched the basement of the premises. People v. Cain (1966), 35 Ill.2d 184, 220 N.E.2d 195; People v. Bell (1972), 53 Ill.2d 122, 290 N.E.2d 214.

Defendant next argues that the complaint for search warrant which was used to obtain the search warrant failed to show probable cause and was so vague and insufficient as to be fraudulent. The basis of defendant's argument is that the statements made by the officer in the complaint for search warrant contained mere allegations and did not specify the

underlying circumstances as required by Aguilar v. Texas (1964), 378 U.S. 108. In the complaint for a search warrant, Officer Berti stated that he had received information from a reliable informant whom he had known for three months. On several previous occasions the informant had supplied information which had resulted in four arrests. Two of those cases were still pending and two had led to convictions. On July 14, 1971, the informant gave him a telephone number, 829-5833, and stated that bets could be placed by calling that number. Berti stated that he personally accompanied the informant to a public telephone, where he dialed the phone number and handed the telephone to the informant. The phone was placed a short distance from the informant's ear so that the officer could listen. After the phone rang once, it was answered by a man who identified himself as "Joe." Joe accepted several bets placed by the informant. On July 15, 1971, the same procedure was followed and another bet was placed. Berti stated that he had checked with the Illinois Bell Telephone security section and that he found the phone number was listed to William Garcia at 2319 West Grenshaw.

In People v. Mitchell (1970), 45 Ill.2d 148, 258 N.E.2d 345, the Supreme Court upheld a search warrant where the defendant argued that the warrant was too vague and did not specify the underlying circumstances required by Aguilar. There, the search warrant was issued upon the affidavit of a police officer who stated that he received information from a reliable informer who on previous occasions had supplied information resulting in a stated number of arrests and convictions. The officer stated that the informer had provided a telephone number which he could call to place bets. The telephone company had provided the name and address of the subscriber to that telephone number. The officer had dialed the number given him by the informer and handed the phone to the informer. The officer heard the informer place a bet on a specified race.

In the case at bar, the complaint for a search warrant stated that the informer was reliable and had in the past supplied information which had led to a stated number of arrests and convictions. Officer Berti specifically stated the circumstances from which he concluded that illegal gambling operations were being conducted. He had, on two occasions, personally dialed the phone number and overheard the informant placing bets and the man at the other end of the phone accepting the bets. The phone number was checked through the telephone company. Under these circumstances, we conclude that the warrant here was based upon probable cause and defendant's motion to quash was properly denied.

Defendant next argues that the search warrant was invalid in that it contained information obtained in violation of the Illinois Constitution. Defendant argues that the police officer's actions in listening to the telephone while the informer placed a bet was in violation of Article 1, Section 6 of the Illinois Constitution of 1970, which states:

"People shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."

The committee comments to this section make it clear that it is intended to create a right to be free from "unreasonable" interference with communications. At page 30, volume 6, of the report of proceedings of the Sixth Illinois Constitutional Convention, the committee report, in discussing this clause, states:

"This addition is intended to create a right in respect to interception of communications that is akin to the prohibition against 'unreasonable searches and seizures.'"

In U. S. v. White (1971), 401 U.S. 745, the Supreme Court held that police officers could testify to a conversation they overheard between the defendant and a police informer which was transmitted by a transmitter concealed on the informer. The conversation was overheard with the informer's knowledge but

without the defendant's knowledge. See also Lee v. U. S. (1952), 304 U.S. 747.

In the case at bar, the police officer had the right, with the consent of the informer, to listen to the telephone conversation between the informer and the defendant. Just as the police officers in White had a right to listen and testify regarding the conversation between the police informer and the defendant which was transmitted to them by an electronic transmitter, Officer Berti's conduct in listening to the conversation with the consent of the informer was not an unreasonable interception of communications under Article 1, Section 6, of the Illinois Constitution of 1970. People v. Nahas (1973), 9 Ill.App.3d 570, 292 N.E.2d 466.

Defendant also argues that the overhearing of the telephone conversation by Berti was in violation of the Illinois Eavesdropping Law (Ill.Rev.Stat. 1971, ch.38, pars.14-1 to 14-7), which bans the use of stated eavesdropping devices except under certain circumstances. Here, the only device used by Berti was a telephone, which is not a device banned by the Illinois Eavesdropping Statute. People v. Brown (1970), 131 Ill.App.2d 244, 266 N.E.2d 131; People v. 5948 West Diversey Avenue, Second floor apartment, Chicago (1968), 95 Ill.App.2d 479, 238 N.E.2d 229. Berti's actions in listening while the informant was on the telephone placing a bet was not conduct that is prohibited by the Illinois Eavesdropping Law.

Defendant's final contention is that the evidence is insufficient to establish his guilt beyond a reasonable doubt because there was no evidence to link him to the betting records found on the table. This court has often stated the rule that it is the function of the trier of fact to determine the credibility of witnesses and the trial court's findings will be disturbed only where the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. People v. Hampton (1969), 44 Ill.2d 41, 253 N.E.2d 385; People v. Sturgis

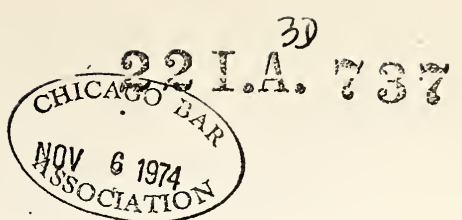
(1973), 14 Ill.App.3d 181, 302 N.E.2d 114.

In the case at bar, the testimony of Officer Berti established that while executing the search warrant, he went down into the basement of the premises where he observed the defendant seated at a table. Defendant was talking on the telephone and had a pen in his hand. Upon seeing the officer, the defendant immediately hung up the phone. On the table at which the defendant was seated there were papers which the officer identified as being the record of bets. This evidence was sufficient to establish defendant's guilt beyond a reasonable doubt on the charge of gambling. People v. Oberlander (1969), 109 Ill.App.2d 469, 248 N.E.2d 895.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

BY: [Signature]



58779

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.)	
	)	HON. SAUL A. EPTON,
LARRY FELDER and JESSIE FELDER,	)	Presiding
)	
Defendants-Appellants.)	

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant Jessie Felder was found guilty by a jury of armed robbery, rape and deviate sexual assault. He was sentenced to 25 to 75 years for armed robbery, 7 to 14 years for rape and 5 to 10 years for deviate sexual assault, all sentences to run concurrently. Co-defendant Larry Felder was found guilty by a jury of armed robbery and attempt rape. He was sentenced to 25 to 50 years for armed robbery and 5 to 10 years for attempt rape, the sentences to run concurrently.

The defendants appeal on the grounds: (1) that they were not proved guilty beyond a reasonable doubt; (2) that the court erred in refusing to grant continuances prior to trial; (3) that the court erred in denying their motions for mistrial after a State witness linked Jessie Felder to the Black-Stone Rangers; (4) that the court allowed improper cross-examination of Jessie Felder and unfair comments about defense tactics; and (5) that their sentences are excessive.

Around midnight on the night of April 9, 1971, two men with guns forced their way into the home of Rosetta Brice and her son, Edward Johnson, and announced a hold-up. John White, Lois Moorehead and a person called Rickey were visiting in the

apartment at the time. The two intruders ordered everyone standing to lie face down on the floor. One attacker, later identified as defendant Jessie Felder, unsuccessfully attempted to have intercourse with Lois Moorehead in the living room, then took her into the bedroom, where he forced her to engage in oral copulation and to have sexual intercourse with him. The second assailant, later identified as Larry Felder, threw Mrs. Brice on the bed in the living room and attempted to have intercourse with her. He failed to achieve penetration. This second assailant also demanded money of those left in the living room. During his search he struck John White and Rickey with his gun. When he threatened her son, Mrs. Brice gave him \$60 she had locked in a trunk. The two men left after about an hour, taking with them a bottle of cologne, a belt, some records, a book of food stamps, \$62 cash and a radio. The victims in the apartment then heard a crash on the stairs -- a sound like the radio falling. A piece of the radio was later recovered from outside the apartment. Mr. White telephoned the police and gave them a description of the men. Police officers traveling in a patrol car in the area heard the description on their radio. It related that the perpetrators of a home invasion in the vicinity were two men, five feet, eleven inches to six feet tall, of slender build, with one wearing an all brown, two-piece leather suit and light brown cap and the other wearing blue pants. Both were described as armed. The officers spotted the defendants on a street corner 2 1/2 blocks from the scene of the crime at approximately 2:00 A. M. They fit the description of the men involved in the home invasion, and the officers arrested them. In a search of Jessie Felder the police recovered a bottle of cologne, a food stamp book

with one \$2 stamp and some cash concealed in his shoe. Larry Felder also had cash in his shoe. The officers also recovered a gun which Jessie Felder had thrown away during pursuit. A fingerprint taken from a radio inside the apartment was identified as Jessie Felder's.

Rosetta Brice, Edward Johnson, John White and Lois Moorehead were taken to the police station to view a lineup at about 4:00 A. M. on April 10, 1971. Rickey left them without giving any explanation. Edward Johnson and Lois Moorehead both testified at trial that they identified the defendants from among the five members of the lineup. John White testified that at the lineup he identified Jessie Felder by sight and Larry Felder by his voice and clothes. A police officer testified that Lois Moorehead's identification of Larry Felder was only tentative at the lineup. Rosetta Brice could not identify the defendants; she testified she never got a good look at either of the intruders.

During the trial Edward Johnson, Lois Moorehead and John White identified the defendants as their assailants. Lois Moorehead denied that her lineup identification of Larry was tentative. Edward Johnson and Rosetta Brice identified the bottle of cologne and food stamp book recovered from Jessie Felder as the ones taken from their home. Edward Johnson, Lois Moorehead and John White identified the gun taken from Jessie Felder as one used in the home invasion.

Jessie Felder testified that while he and Larry Felder were on the street corner where they were arrested, three men raced by them. Officers whom Jessie Felder believed were in

pursuit of these men instead arrested the Felder brothers. Jessie testified that they were taken to the police station and kept there for some time during which he was forced to touch certain objects, among them a radio. He denied having any of the victims' properties in his possession when arrested, and he denied ever being in Rosetta Brice's apartment.

The defendants' mother and a family friend said that the defendants were home until about 11:30 P. M. Another friend testified that he saw the defendants arrested at about midnight. Both arresting officers testified that the arrest took place at about 2:00 A. M.

The defendants argue that they were not proved guilty beyond a reasonable doubt. They base this argument on what they term weaknesses in the identification testimony. As to Jessie Felder the argument also includes an attack on the chain of custody of the radio from which his fingerprint was taken.

The State responds and we agree that there was sufficient testimony by Lois Moorehead alone to support the conviction of the Felders. Lois Moorehead testified that she saw both defendants as they entered the apartment and that she saw Jessie Felder's face when he attempted to have intercourse with her in the living room and again when he succeeded in having intercourse with her in the bedroom. She saw Larry Felder's face again when Jessie allowed her to leave the bedroom. The lighting in the apartment was good and the defendants were there for over an hour. She gave a description to the police at the station which matched that of the defendants at the time they were arrested. It is settled that the testimony of one

credible witness is enough to establish guilt beyond a reasonable doubt. (People v. Stringer, 52 Ill. 2d 564, 289 N.E.2d 631.) Lois Moorehead had ample opportunity under good conditions to observe the defendants. She identified them at a lineup shortly after the incident and identified them at trial.

The identification of the defendants by Edward Johnson and John White supports Lois Moorehead's testimony. Any inconsistencies in the testimony of the witnesses in this case are minor and do not raise a reasonable doubt of the defendants' guilt. (People v. McGee, 21 Ill. 2d 440, 173 N.E.2d 434.) The defendants' attack on the chain of custody of the fingerprint identified as Jessie Felder's taken from a radio in the apartment is without merit. The police officers testified that the print was taken and passed along according to the procedures of the department. Jessie Felder's testimony that he was forced to touch objects at the police station is simply an unsupported, self-serving declaration that the jury chose not to believe.

The second argument raised by the defendants is that the court abused its discretion in refusing to grant a continuance so that they could retain counsel of their choice. They also contend that defendant Larry Felder's attorney, a public defender appointed on the day of trial, was forced to try the case with inadequate preparation.

The general rule in this situation is that an accused in a criminal case has the constitutional right to be represented by counsel of his choice, but that right may not be invoked to thwart the administration of justice. (People v. Solomon, 24 Ill. 2d 586, 182 N.E.2d 736.) The defendants cite two cases in support of their claim that their convictions should be

reversed. In the first, reversal was ordered because of the denial of a motion for a continuance to obtain private counsel. (People v. Green, 42 Ill. 2d 555, 248 N.E.2d 116.) That case involved the summary denial of a request for a continuance without an inquiry into the defendant's claim that private counsel had been retained. In the second case involving the denial of a motion for a continuance, the defendant was incarcerated until trial and had attempted to retain a named attorney who returned from vacation shortly before the trial was to begin. The attorney did not appear on the day of trial. The appellate court reversed, noting that the defendant desired the named attorney to represent him, that the defendant did all he could to reach him after his vacation and that the attorney indicated by affidavit that he could have represented the defendant. (People v. Willis, 6 Ill. App. 3d 980, 286 N.E.2d 72.) The court in Willis listed certain areas relevant to its inquiry on this issue: the facts that the defendant was continuously incarcerated, that he informed the trial court of his efforts to obtain private counsel, and that he manifested dissatisfaction with appointed counsel but cooperated with the public defender. None of these factors is present in the instant case. The defendants here were out on bond for over a year before trial, during which time the public defender represented both of them. They did not express dissatisfaction with this representation even at the time of the request for a continuance to obtain other counsel. The defendants stress the facts that they were not incarcerated and that they were employed as support for their claim that they could afford private counsel. They argue that this weighs in favor of reversal for failure to grant a continuance. We find to the contrary that these facts support the trial judge's

refusal to grant a continuance. There is no evidence of any effort made by the defendants or notice to the court of their desire to obtain private counsel before trial, though they had ample opportunity. The defendants' request for a continuance would, if granted in this case, amount to the thwarting of justice which the trial judge had the discretion to prevent.

The argument by Larry Felder that the public defender who was appointed for him had inadequate time to prepare the case is also without merit. The public defender who represented both defendants stated that since there was a potential conflict in his representation of both men, another attorney should be appointed for Larry Felder's defense. The court, although not agreeing that a conflict existed, allowed another assistant public defender to take over Larry Felder's representation and the voir dire examination proceeded. The following day Larry Felder's attorney requested a continuance to prepare the case. The court denied this request.

The denial of a motion for a continuance to prepare for trial is within the discretion of the trial court and requires reversal only if the denial embarrassed the defendant in preparing his defense and prejudiced his rights. (People v. Solomon, 24 Ill. 2d 586, 182 N.E.2d 736.) The defendants contend that the denial of a continuance in this case resulted in long prison terms for them, yet they offer nothing to support this statement. The defendants' argument that there were weighty decisions to be made by trial counsel and that her lack of time to prepare prevented her from knowledgeably selecting from alternatives is not borne out by the record. The report of proceedings indicates no instance in which trial

counsel showed herself to be inadequately prepared. In view of this fact and that the defendants must show prejudice, rather than speculate as to its existence, we find no merit in this contention of the defendants.

The defendants next contend that the court erred in denying their motions for a mistrial when a State's witness linked them to the Black-Stone Rangers. The witness, a police officer, was called to testify as to Jessie Felder's reputation for truth and veracity. The witness responded that Jessie Felder was a member of the Black Peace Stone Nation. The State moved that the response be stricken as unresponsive to the question. The trial court made no ruling on the motion. The State then asked whether Jessie Felder's "reputation is good or bad for truth and veracity?" The witness replied that it was bad. Jessie Felder's attorney objected and requested a mistrial which was denied. If this were error at all, we find that it was harmless error in light of the overwhelming evidence of the defendants' guilt. People v. Oparka, 105 Ill. App. 2d 158, 245 N.E.2d 69.

The defendants raise a similar argument with respect to a selection of statements made by the State. They contend that these statements prejudiced them and require reversal. We need not detail the allegations of prosecutorial misconduct, since we find that they did not result in prejudice to the defendants; hence, they do not require reversal. People v. Clark, 52 Ill. 2d 374, 288 N.E.2d 363; People v. Nilsson, 44 Ill. 2d 244, 255 N.E.2d 432.

The defendants' final argument is that their sentences are excessive. Defendant Jessie Felder had one prior

conviction for criminal trespass. Defendant Larry Felder had one prior conviction for theft. Two ministers testified as to the defendants' good character.

The imposition of sentence is within the trial court's discretion and will not be disturbed by a reviewing court unless there was an abuse of discretion. (People v. Williams, 130 Ill. App. 2d 192, 266 N.E.2d 145.) The crimes in this case were of a very serious nature. We find, however, that the circumstances of the crimes, in light of the defendants' records, do not warrant sentences of the severity imposed for armed robbery. Under our authority to reduce such sentences (Ill. Rev. Stat. 1973, ch. 110A, par. 615), we reduce the sentence imposed upon Jessie Felder for armed robbery to 15 to 45 years and the sentence imposed upon Larry Felder for armed robbery to 15 to 45 years. In addition, the sentence imposed upon Larry Felder for attempt rape is reduced to one to three years (People v. Scott, 14 Ill. App. 3d 211, 302 N.E.2d 146), in spite of amendment of the Uniform Code of Corrections. (Ill. Rev. Stat. 1973, ch. 38, par. 8-4(c)(4).) The amendment cannot be enforced without violating the constitutional proscription against ex post facto laws. People v. Dupree, 16 Ill. App. 3d 769, 306 N.E.2d 693.

The judgments are affirmed as modified.

JUDGMENTS AFFIRMED AS MODIFIED

GOLDBERG, J. and HALLETT, J., concur.



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221.A. 738

No. 58024

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
EDDIE PERRY,	)	HONORABLE
	)	SAUL A. EPTON,
Defendant-Appellant.	)	PRESIDING.

Mr. JUSTICE MCGLOON delivered the opinion of the court:

The defendant, Eddie Perry, was indicted for murder. After a jury trial in the circuit court of Cook County he was found guilty of involuntary manslaughter. He was sentenced to a term of 7 to 10 years in the penitentiary and has appealed to this court.

Part of his appeal presents two instances of alleged trial error. His first contention is that the trial court erred in admitting certain hearsay testimony into evidence. His second contention is that testimony which referred to defendant's refusal to speak to the police following his arrest was prejudicial. In both instances he requests that this court reverse his conviction and remand the cause. The other part of his appeal concerns his sentence in light of the Unified Code of Corrections. He contends that the sentence imposed was excessive and requests a reduction of its term.

We affirm as modified.

The murder prosecution resulted from the fatal beating of Louis C. Holly. Officer Charles Sias of the Chicago Police Department testified at trial that approximately one week before Holly's death, Holly approached his squad car and had a conversation with him. As a result of this conversation Officer Sias went to Holly's apartment and had a conversation with the defendant, who was Holly's roommate at the time. Over defense counsel's objection the trial court allowed Officer Sias to testify to the contents of that conversation:

"THE WITNESS: A At that time, in the apartment, I told Mr. Perry to stop threatening Reverend Holly and I also told him that Reverend Holly had flagged me down on the street at 14th and Loomis ***. And that Mr. Holly stated he was afraid to come home because there was a man in his apartment that was going to beat him up when he got home."

On cross-examination defense counsel pursued this line of questioning . Officer Sias could not recall whether Perry made any admissions or denials when confronted with the above statements. The officer made a verbal report of the incident over the police radio.

Officer Sias further testified that on December 13, 1970 he found the dead body of Reverend Holly lying on the sidewalk, clad in only a pair of trousers, and one sock. Sias went to Holly's residence and arrested the defendant as he was leaving the apartment. He found the apartment in a shambles. There was blood on a chair and a shirt on the floor.

Officer Ware of the Chicago Police Department was also present when Holly's body was found. He accompanied Officer Sias to Holly's residence and observed the defendant as he was leaving the apartment. Ware testified that inside the apartment he saw a jacket which matched the pants Holly was wearing, Holly's other sock, and bloodstains on a chair and floor. After defendant was arrested and advised of his rights, he refused to say anything.

Bobbie Lockhart testified that he was acquainted with the decedent and the defendant. He was drinking with the defendant much of the time on the day before the incident and the day of the incident. At about 8:00 P.M. on December 12, 1970 he testified that the defendant and Holly engaged in a dispute concerning a welfare check. The dispute erupted into a fight during which the defendant beat, kicked and jumped on Holly. The beating lasted for about ten or fifteen minutes. Lockhart testified that he stopped the defendant at first but defendant

continued the beating and stated he was going to kill Holly. After this incident defendant put Holly in the bedroom and left the apartment with Mr. Lockhart. Upon returning to the apartment, Lockhart and the defendant carried Holly's body to the sidewalk. Lockhart then called the police and left.

Dr. Jerome Kearns, a pathologist with the Coroner of Cook County, examined the decedent's body and found swelling of the tissues of the head, lips and neck; fractured ribs; fractured chest bone; lacerated liver, spleen and mesentery; and internal bleeding. In his opinion the cause of death was the result of external violence to the abdomen and chest. He testified that blows from the fist or stomping could have caused the injuries.

Maggie Grigler, a neighbor of Holly, testified that on December 13, 1970, at about 7:30 P.M., she saw defendant drag a man out of a building onto the sidewalk and heard him say to another man, who was with him, "Let's go man. He's dead." Willie Davis, who was with Maggie Grigler at the time, also observed two men dragging Holly into the street, but could not positively identify Perry in court as one of the men.

Richard Sandberg of the Chicago Police Department interviewed Bobbie Lockhart and Eddie Perry on December 13, 1970 at the police station. Officer Sandberg advised the defendant of his rights and asked him about the homicide. Sandberg testified that the defendant stated at first that he did not know anything about the incident. An hour later Sandberg again questioned the defendant. On this occasion he confronted the defendant with a statement which was taken from Lockhart. The defendant admitted being present but stated that Lockhart and his cousin removed the body. He finally admitted to carrying the body out, but denied participating in the beating.

The defendant testified in his own behalf. He testified that he and Holly got into an argument about Lockhart's staying in the apartment. According to the defendant, Holly jumped up and hit him twice. Defendant admitted that he hit Holly a few times and knocked him unconscious. As a result of the fight, defendant testified he incurred a swollen eye.

On cross-examination, defendant denied threatening Holly a week before the killing and did not remember seeing Officer Sias at that time. He stated he had been drinking all day before the fight, but was not drunk. In rebuttal, Officer Doelker of the Chicago Police Department testified that when he arrested the defendant he noticed no cuts or bruises on him.

At the close of the evidence the trial court gave defendant's instructions on voluntary intoxication and self-defense. Defendant maintained that he was acting in self-defense and also that because of his intoxication he did not possess the mental state necessary for a murder conviction. The jury found defendant guilty of involuntary manslaughter.

Defendant's first contention concerns alleged prior threats that defendant made to Holly a week before the killing. The prosecution asked Officer Sias what Holly had said to him. Defense counsel's objection to this question was sustained. However, later in the testimony, the contents of the conversation were revealed in the testimony of what Officer Sias told defendant. Sias testified that he told defendant that Holly stated that "he was afraid to come home because there was a man in his apartment that was going to beat him up when he got home." Defense counsel objected to this statement on the basis of hearsay. This objection was overruled.

The above quoted statement did not contain a threat

in the ordinary sense of that term. What we have here is an expression of the victim's state of mind one week before his killing and his reason for such fear. The prosecution argues that this declaration of mental state does not fall within the prohibition of the hearsay rule and that decedent's mental state was relevant to the issues in this case. We agree that under circumstances indicating that such a statement was made with apparent sincerity it may be received in evidence. (See McCormick on Evidence, sec.294 (2d ed. 1972).) Obviously, the state of mind which is expressed must be relevant to the issues in the case before it should be admitted. People v. Newbury, 53 Ill.2d 228, 239-40, 290 N.E.2d 592, 598-99.

The manner in which Holly flagged down the police squad car and told Officer Sias his fear of the defendant indicates that the statement was made spontaneously. Apparently Officer Sias was impressed with Holly's sincerity as he went almost immediately to Holly's apartment to confront the defendant. The statement was relevant to the issue of defendant's identity and to the theory of self-defense which the defendant espoused.

We must emphasize that we proceed with caution when a statement of the victim's fear that defendant will do him harm is admitted to infer that defendant subsequently did kill him. However, in the instant case the statement was merely corroborative of other evidence of defendant's identity. Lockhart's testimony that he saw the defendant beat the deceased, the testimony of at least one witness who saw defendant drag the body outside and abandon it, and defendant's own testimony that he struck the deceased all indicate that he was the killer. Likewise, the expression of fear was only corroborative of other evidence which tended to rebut any evidence of self-defense. The nature and extent of decedent's injuries and the testimony rebutting defendant's own claim of injury

indicate, at least, an excessive use of force.

Furthermore, the complained of statement does not stand alone or uncontroverted. The jury was provided with defense counsel's cross-examination of Officer Sias concerning Holly's communication of previous "threats". Defendant denied threatening Holly and did not remember being confronted by Officer Sias before the incident. Under these circumstances we find that admission of the statement in evidence was not error. Although a decision of another jurisdiction, the case of State v. Gause, 107 Ariz. 491, 489 P.2d 830, death sentence vacated, 409 U.S. 815, 93 S.Ct. 192, 34 L.Ed2d 71, directly supports our holding.

Defendant's second contention is that the admission of testimony concerning defendant's refusal to speak to the police following his arrest was prejudicial. Defendant concedes that he did not object to any of these references at trial. Nevertheless he claims that we should consider the assignments of error under the "plain error" rule. (Ill.Rev. Stat. 1971, ch.110A, sec.615(a).)

Defendant's refusal to speak came after he was arrested and while he was in police custody. Defendant relies on the case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed2d 694, to support his contention that the admission of certain testimony penalized him for exercising his right to remain silent.

Officer Ware testified that after he arrested defendant and informed him of his rights, defendant refused to say anything. He further testified that on the way to the police station defendant refused to talk to him and his partner. Defendant also points to certain testimony of Officer Sandberg which he claims was objectionable. Upon closer examination of this testimony we find it difficult to perceive whether defendant was silent in the face of accusation or rather denied

having any knowledge of the incident. In any event, defense counsel raised no objection to any of the testimony he now finds objectionable.

Defendant relies upon the case of People v. McDowell, 4 Ill.App.3d 382, 280 N.E.2d 471, where the court invoked the plain error rule to reverse a conviction which was based, in part, on testimony that defendant refused to talk to the police about the crime. In that case, as distinguished from the instant case, the evidence was close on the issue of guilt. Here the evidence of defendant's guilt was substantial and the prejudice, if any, was minimal. We must conclude that defendant has waived any objection by failing to object at trial, (People v. Newbury, supra, at 598), and that the admission of the alleged objectionable testimony was not so prejudicial as to amount to "plain error". See People v. McVet, 7 Ill.App. 3d 380, 287 N.E.2d 479.

Defendant's final contention concerning the excessiveness of his sentence is well founded. However, our decision to reduce is based on the strict requirements of the Unified Code of Corrections which is applicable to this cause and not on any notion of harshness which is quickly dispelled when one examines the brutality of the killing and the extensive criminal record of the defendant.

Because this case had not reached the stage of final adjudication on the date when the Unified Code of Corrections became effective, the more lenient sentencing provisions are applicable. (People v. Chupich, 53 Ill.2d 572, 295 N.E.2d 1.) Under these provisions the crime of involuntary manslaughter is a Class 3 felony, (Ill.Rev.Stat. 1973, ch.38, sec.9-3(c)), which carries a maximum term of 10 years and a minimum of 1 year, "unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant sets a higher minimum term, which shall not be greater than one-third of the maximum term set in that case by the court."

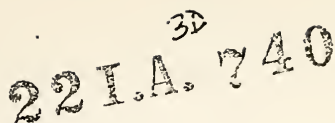
(Ill.Rev.Stat. 1973, ch.38, sec.1005-8-1(c)(4).)

In accordance with these provisions we reduce the term originally imposed of 7 to 10 years to a term of 3 years 4 months to 10 years. We decline defendant's request to reduce either the minimum or maximum of this modified sentence any further based on the obvious lack of justification which the record shows for so doing.

Accordingly the judgment of the circuit court of Cook County is affirmed with the exception that the sentence be modified as set out in this opinion.

Judgment affirmed as modified.

Dempsey and Mejda, JJ., concur.



PEOPLE OF THE STATE OF ILLINOIS,)
)
)
 Plaintiff-Appellee,)
)
)
 vs.)
)
)
 JAMES BOBBY BOY, a/k/a)
)
)
 FREDDIE E. BROWN,)
)
)
 Defendant-Appellant.)

HONORABLE
RICHARD J. FITZGERALD,
PRESIDING.

James Bobby Boy, a/k/a Freddie E. Brown, defendant, was found guilty after a bench trial of the crime of murder (Ill.Rev. Stat. 1971, ch.38, par.9-1.) He was sentenced to a term of 14 to 20 years. Defendant appeals, arguing (1) that he did not knowingly and understandingly waive his right to a trial by jury, (2) that the evidence was insufficient to establish his guilt beyond a reasonable doubt, and (3) that the facts at best demonstrate that he should have been found guilty of voluntary manslaughter.

At trial, the testimony of Anna Hayes, Jeanna Hayes, Edward Harris, Lillie Blackman and Willie Johnson established that shortly before midnight on August 12, 1971, Anna Hayes returned to her apartment at 3849 W. Flournoy Street, Chicago, Illinois, where she lived with Kassie Cannady. Anna Hayes' mother, father, sister and brother lived on the second floor of that address. Present in the apartment were Anna Hayes, Leonard Hayes, Kassie Cannady, Willie Johnson, Jeanna Hayes and Edward Harris. A short time later, the occupants of the apartment heard loud voices outside the home and several of them recognized one of the voices as belonging to Leonard Hayes. The occupants of the apartment went toward the front door when they heard a shot. As they went onto the porch of the home, they observed Leonard Hayes and the defendant arguing. Defendant was standing near his car which was parked in front of the home. Defendant started toward Leonard Hayes when Leonard told defendant not to walk toward him. Defendant reached into his car and told a woman

occupant to "give it to me". Defendant then turned and put his hand into his pocket. Defendant again approached Leonard Hayes who fired a second shot into the air and told defendant to stay away. Defendant returned to his car and drove off. Anna Hayes took her brother into the second floor of their home. The other occupants returned to the first-floor apartment.

Anna and Leonard Hayes returned to the first-floor apartment. Leonard Hayes remained in the apartment for a short period of time and then left. Thereafter Lillie Blackman came into the apartment. Kassie Cannady heard a car pull up and walked toward the front of the apartment. She saw the defendant drive up in front of the home. The people in the apartment went out onto the front porch. Anna Hayes asked the defendant if she could talk with him and the defendant agreed. Anna Hayes went down to defendant's car and asked him not to harm her brother. Defendant stated that he only wanted to talk to Leonard. Anna Hayes observed Leonard Hayes walking down the street and called him over to defendant's car. As Leonard Hayes approached defendant's car with his hands outstretched the defendant pulled a gun and shot Leonard Hayes. Defendant then backed up his car and shot Leonard Hayes two more times as he lay on the ground. Defendant drove off.

Leonard Hayes was placed in Charles Jordan's car to be taken to Garfield Hospital. Edward Harris, Anna Hayes, Jeanna Hayes, Kassie Cannady and Lillie Blackman all got into Edward Harris' car to go to the hospital. As they approached the intersection of Springfield and Harrison, they observed the defendant's car, which had been stopped by the police. They informed the police officers that defendant had just shot Leonard Hayes. Defendant was placed under arrest. The same evening the police officers went to the Hayes' home where they recovered the gun Leonard Hayes had used earlier that evening from under a pillow on the couch in the first-floor apartment of Anna Hayes.

William C. Foster, an investigator for the Chicago Police Department, testified that on August 13, 1971, he was assigned the

investigation of the killing of Leonard Hayes. After interviewing Leonard Hayes and the witnesses to the shooting, he proceeded to 3849 W. Flournoy, Chicago, Illinois where he recovered the gun Leonard Hayes had used earlier in the evening from a couch in the first-floor apartment.

Chicago Police Officer Edward Franczyk testified that on August 13, 1971, at approximately 1:30 A.M., he was on patrol in the area of Harrison and Springfield when he heard several gunshots. He then heard tires squealing and observed a vehicle traveling at a high rate of speed turning from Flournoy onto Springfield Avenue. He curbed the vehicle and asked the defendant, who was driving, for his license. At this time he observed a pistol lying on the floor between the gas pedal and the seat of the vehicle. The defendant and the two other occupants of the car were ordered out of the vehicle. Shortly thereafter, a car approached and several people jumped out and began saying that the defendant had just shot their brother. Defendant was placed under arrest and transported to the 11th District Police Station.

It was stipulated that if Dr. E.J. Shalgos were called to testify, he would testify that he is a coroner's physician for the Coroner of Cook County. On August 13, 1971, he examined the body of Leonard Hayes. The cause of the death of Leonard Hayes was a bullet to the chest, heart and lung. At the time of death, Leonard Hayes' blood contained alcohol in the amount of .212 milligrams.

It was also stipulated that if Ernest N. Warner were called to testify he would testify that he is employed as a ballistics expert for the Chicago Police Department. On August 13, 1971, he examined the bullet recovered from Leonard Hayes' body and the gun recovered from the defendant's car. In his opinion, the bullet removed from Leonard Hayes' body was fired from defendant's weapon.

Kassie Mae Cannady was called as a defense witness and testified that on August 12, 1971, she was a roommate of Anna Hayes.

Previously she had lived with the defendant for one year. Shortly before midnight, she was in the apartment when she heard loud voices as belonging to Leonard Hayes. She heard a shot outside and went out onto the front porch. There she heard Leonard Hayes tell defendant to stay away from the house. Leonard Hayes fired a second shot into the air and defendant left the scene. Leonard and Anna Hayes went to the upstairs apartment. After a short period of time, Anna and Leonard Hayes came back down to the first-floor apartment. Cannady testified that she went to the front door when she heard a car pull up. She saw the defendant drive up to the house and informed the occupants of the apartment of this fact. Anna Hayes asked defendant if she could talk with him. She went down to defendant's car and asked him not to hurt her brother. Leonard Hayes came walking down the street and Anna Hayes called him over to defendant's car. As he approached, defendant took out a gun and shot Leonard Hayes. Cannady testified that she had previously given contradictory statements to the Chicago Police Department immediately after the shooting, but that these statements were in fact not true.

Willie Williams testified that both he and Leonard Hayes were members of the Vice Lords street gang. On August 12, 1971, he saw Leonard Hayes at a tavern at the corner of Pulaski and Flournoy. At that time, Leonard Hayes talked of dying and said that he was going to take someone with him.

Williams testified that Kassie Mae Cannady is his mother's sister. Several days after the shooting, he had a conversation with Kassie Mae Cannady at his mother's house. At that time, she told him that defendant was talking to Anna Hayes when Leonard Hayes came toward defendant's car and fired a shot. Defendant then returned the fire and shot Leonard Hayes. Williams testified that Kassie Mae Cannady told him that at the time of the shooting Leonard Hayes had a gun which Anna Hayes took and put into the house.

James Bobby Boy, defendant, testified that on August 13, 1971,

shortly after midnight, he had a conversation with Leonard Hayes on the street in front of the Hayes' home. At that time, Leonard Hayes ordered him to leave. Leonard Hayes pulled out a gun and fired at him. Defendant stated that he grabbed another man at the scene, and threw him in the line of fire between Leonard Hayes and himself. Leonard Hayes fired a second shot and threatened to kill him if he ever came back into the area. Defendant testified that he then got into his car and left the scene.

Defendant testified that a short time later he was driving down the street when he was stopped by Anna Hayes, who told him that she was sorry about what had occurred. As he was talking to Anna Hayes, he observed Leonard Hayes coming at him with a gun in his hand. Defendant testified that he grabbed his gun and shot Leonard Hayes to protect himself.

In rebuttal Rella Williams, the mother of Willie Williams, testified that on or about August 14, 1971, she had a conversation with Kassie Mae Cannady. Her son, Willie Williams, was not present during that conversation.

Defendant's first contention on appeal is that he did not knowingly and understandingly waive his right to a trial by jury. The record reflects that when defendant's case was called, the trial judge inquired as to whether it was going to be a bench trial or a jury trial. Defense counsel, in defendant's presence, responded, "Your Honor, I think that we are going to ask for a bench trial in this matter". Thereafter, the trial judge addressed the defendant and told him that defense counsel had advised the court that he wished to proceed with a bench trial. The trial judge informed the defendant that he had a constitutional right to have a trial by jury, to have twelve people who would determine his guilt or innocence based upon the evidence to be presented in open court. Defendant then signed a jury waiver which was presented to the trial court.

This court has often stated the rule that there is no specific formula for determining whether a defendant's waiver of the right to a trial by jury is knowingly and understandingly entered. Each case depends upon the particular facts and circumstances of that case. (People v. Richardson (1965) 32 Ill.2d 497, 207 N.E.2d 453; People v. Wesley (1964) 30 Ill.2d 131, 195 N.E.2d 708.) A lengthy explanation of the consequences of a jury waiver is not a prerequisite to the validity of that waiver. (People v. Geary (1972) 8 Ill. App.3d 633, 291 N.E.2d 13.) Defense counsel's waiver of the right to a trial by jury made in defendant's presence without objection by defendant is a valid jury waiver, binding upon defendant. People v. Sailor (1969) 43 Ill.2d 256, 253 N.E.2d 397; People v. Kaprelian (1972) 6 Ill.App.3d 1066, 286 N.E.2d 613.

In the case at bar, privately retained defense counsel, in defendant's presence, stated that defendant desired a bench trial. Counsel's statement was not ambiguous and could itself be considered sufficient to constitute a valid jury waiver binding upon defendant. In addition, the trial judge specifically informed defendant that he had a right to a jury trial and thereafter defendant voluntarily signed a jury waiver which was presented to the trial court. Under these circumstances, we conclude that defendant voluntarily, knowingly and intelligently waived his right to a trial by jury. People v. King (1972) 4 Ill.App.3d 1066, 282 N.E.2d 746.

Defendant's second contention on appeal is that the evidence is insufficient to establish his guilt beyond a reasonable doubt because the testimony of the State's witnesses was contrary to human nature, common experience and was simply unbelievable. In a bench trial, the credibility of witnesses and the weight to be given to their testimony is a matter for the trial judge to determine and his decision will not be disturbed unless it is based upon evidence which was so unsatisfactory as to raise a reasonable doubt as to defendant's guilt. People v. Catlett (1971) 48 Ill.2d 56, 286 N.E.2d 378; People v. Wright (1971) 3 Ill.App.3d 262, 278 N.E.2d 175.

In the case at bar the testimony of several of the State's witnesses established that during the early morning hours of August 13, 1974, defendant and Leonard Hayes had a quarrel outside the Hayes home. At that time Leonard Hayes was armed with a revolver and fired two shots into the air. The defendant got into his automobile and left the scene. Anna Hayes took her brother, Leonard Hayes, into the house and calmed him down. Some time later Anna Hayes was talking to the defendant who had returned to the scene and was seated in his automobile. At this time the defendant stated that he only wanted to talk to Leonard Hayes. Anna Hayes called Leonard Hayes over to the car and as he approached with his hands outstretched the defendant pulled out a gun and shot him. Leonard Hayes fell to the ground, defendant backed up his car and fired two more shots at Leonard Hayes. Defendant drove off at a high rate of speed and was apprehended by the police a short distance away. Discrepancies and minor inconsistencies in the testimony of witnesses such as those pointed out by the defendant in the case at bar do not destroy the credibility of the witnesses but go only to the weight to be given their testimony. (People v. Reese (1973) 54 Ill.2d 51, 294 N.E.2d 288.) After a careful review of the entire record, we conclude that the testimony of the State's witnesses was not so unreasonable as to create a reasonable doubt as to defendant's guilt.

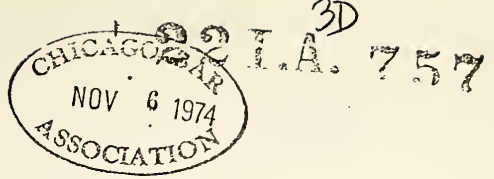
Defendant's next contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because he was under the reasonable belief that he was threatened with imminent death or great bodily harm and was therefore justified in shooting Leonard Hayes. In the alternative, defendant argues that even if his belief was unreasonable he should at most be convicted of voluntary manslaughter. The question of whether self-defense has been established by the evidence is always a question of fact for the trial court to decide. (People v. Meeks (1973) 11 Ill.App.3d 973, 297 N.E.2d 705.) Here it was the defendant's own testimony which attempted

to establish the element of self-defense. Defendant's testimony and that of his witnesses need not be believed by the trier of fact. (People v. Lahori (1973) 13 Ill.App.3d 572, 300 N.E.2d 751; People v. Wilkes (1971) 2 Ill.App.3d 626, 276 N.E.2d 761.) In the case at bar, the defendant's version of what had occurred was directly contradicted by the testimony of Anna Hayes, Jeanna Hayes, Edward Harris, Lillie Blackman and Willie Johnson. After a review of the entire record, we conclude that the trial judge was fully justified in disbelieving the defendant and his witnesses and in believing the testimony of the State's witnesses, which was sufficient to establish defendant's guilt on the charge of murder beyond a reasonable doubt.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. Mr. Justice Mejda did not participate.



No. 60052

PEOPLE OF THE STATE OF ILLINOIS,)
) APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)
) COURT OF COOK COUNTY.
v.)
) HONORABLE
STANLEY WILLS,) JAMES MURPHY,
) PRESIDING.
Defendant-Appellant.)

PER CURIAM:

Defendant, Stanley Wills, was found guilty after a bench trial of the offense of aggravated assault. (Ill.Rev.Stat. 1973, ch.38, par.12-2(a)(1).) The common law record recites that he was sentenced to a term of two years probation on condition that the first 15 days be served in the House of Correction work release program; the finding of the trial court contained in the report of proceedings recites that the condition of probation was 30 days in the work release program. On appeal he contends that the State failed to prove his guilt beyond a reasonable doubt, that the trial court erred in denying his motion for a directed finding, and that the sentence imposed is excessive.

The evidence adduced for the State demonstrated that on the evening of October 21, 1973, Teresa Moore, aged 12, was walking to a neighbor's house from her home on the south side of Chicago when the defendant called to her from his automobile; Miss Moore entered the neighbor's house, and upon her return to the street, the defendant again called to her, waving a pair of scissors and stating, "Come here or else." Miss Moore became frightened, ran to her home, and told her father of the incident.

Upon being told of the threat, Miss Moore's father, Wiley Moore, who at the time was in his garage fronting on the same street, "jumped up" and proceeded outside where the daughter pointed out the defendant who was just getting into his car parked a short distance down the street. Mr. Moore called to the defendant that he would like to speak to him and he asked the defendant why he was "meddling" with his daughter; the defendant replied that he had simply called to her. Mr. Moore

approached the car and the conversation with defendant became "abrasive"; the defendant "drew back" a pair of scissors to Moore's chest, the latter demonstrating to the court the manner in which defendant so acted. Mr. Moore stepped back from the car, his son arrived and slammed the car door on the defendant who was then partly inside the vehicle, and the defendant alighted and swung the scissors at Moore's son, cutting him on the wrist. The son then "slammed him down" and the defendant rose and fled the scene. The son also demonstrated to the court at trial the manner in which the defendant held the scissors to his father, and explained that defendant made an overhand motion with the scissors and that he did not raise the hand above the head but kept it parallel to the head; he further stated that defendant at that time was partly inside and partly outside the car, with one foot inside the car and the other on the ground.

Defendant's motion for acquittal at the close of the State's case-in-chief was denied; the court specifically noted that there was no evidence of self-defense on defendant's part and that Mr. Moore was an elderly man who wore a brace.

Defendant testified in his own behalf, stating that he lived a few blocks from the scene and had parked his automobile at that location in order to repair a broken, plastic, rear window, using tape and scissors for that purpose. He observed a girl on the street and asked how she was, to which comment the girl stopped, knocked on the window of a nearby building exclaiming, "Hurry out the back door," and proceeded to the rear of that building; he did not see that girl again. About 10 or 15 minutes later, while defendant was inside his vehicle repairing the window, Mr. Moore approached from the same area the girl had entered and stood by defendant's car, stating, "Hold it right there, young man." Defendant stated that he had seen Moore approaching, and asked, "What's wrong," to which Moore replied that defendant should exit the vehicle. As defendant stepped from the car, Moore's son hit him; he jumped

from the car and the son hit him again; and defendant ran down the street, stating that he was going to call the police. Defendant testified that he did not know the Moores prior to the incident; that he called the police from a neighbor's house; and that he was arrested after returning to the scene. He further stated that he did not have the scissors in hand when he was conversing with Mr. Moore, but that the scissors were in his car when he fled the scene. In rebuttal, the State elicited evidence that Teresa Moore telephoned the police, and that there was no one living on the block by the name of the person whose telephone defendant had allegedly used to call the police.

Defendant was found guilty of aggravated assault upon Mr. Moore; the court found him not guilty as to Teresa Moore, the court stating that defendant made attempts toward her but that the distance was too great between them to have presented a danger to her. It was brought out in aggravation and mitigation that defendant had been placed on supervision for a theft offense, and that he was employed and living with his wife and two children.

Defendant argues that the People's evidence failed to prove his guilt beyond a reasonable doubt in two respects: first, that the accounts of the confrontation given by Mr. Moore and his son were "physically incompatible with the accusation of aggravated assault" in that it was not possible for defendant to have raised the hand holding the scissors over his head while seated inside the automobile as those witnesses had testified; and second, that the People's evidence was uncorroborated by the introduction of the scissors, a police report, or the like, leaving a doubt as to his guilt.

The "physical impossibility" ascribed by defendant to the State's evidence is non-existent. Both Mr. Moore and his son demonstrated to the trial court, the trier of fact, the manner in which the defendant assaulted the elder Moore with the scissors, and the son expressly testified that defendant did not raise his hand above his head while holding the scissors

inside the car, but merely raised it parallel to his head. As the foregoing summary of the evidence demonstrates, the testimony of the State's witnesses is not "so improbable" as to give rise to a reasonable doubt of his guilt; the case of People v. Smith, 404 Ill. 350, 88 N.E.2d 834, cited by defendant in support of his position, is not in point.

The fact that the scissors, a police report, or the like, were not introduced into evidence does not raise a reasonable doubt as to guilt. As above noted, the evidence adduced by the State, if believed by the trier of fact, was sufficient to prove defendant guilty of the offense of aggravated assault upon Mr. Moore; the credibility of the State's witnesses was not affected by the lack of that other evidence which, if in existence, would have served only as cumulative to the competent evidence adduced of the offense. The case of People v. Washington, 27 Ill.2d 104, 186 N.E.2d 739, cited by defendant is not in point.

Defendant's contention that his motion for a directed finding at the close of the State's case should have been allowed is also without merit. That contention is based upon fragments of the evidence which defendant argues show that, from all outward appearances, Mr. Moore and his son were the aggressors and that defendant had a right to defend himself. Not only does defendant's contention ignore the evidence that Mr. Moore had been informed that defendant had threatened Miss Moore with the scissors, but it also ignores the evidence that Mr. Moore approached the defendant in a manner not suggestive of violence. The evidence does not establish that defendant was entitled to a finding of not guilty by reason of self-defense. (People v. West, 13 Ill.App.3d 550, 300 N.E.2d 808.) Questions relating to the manner in which Mr. Moore had approached the defendant's vehicle, the time of day the confrontation had occurred, and the like, were matters for the trier of fact; they were resolved in favor of the State, as is demonstrated by the trial court's ruling on the motion. The cases cited by defendant in support

of his position are not in point: People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749; People v. Scott, 6 Ill.App.3d 281, 285 N.E.2d 476.

The final contention raised by defendant is that the sentence imposed is excessive. He states that he was denied an appeal bond, so that by the time this court considers this appeal he will have served the 15-day period on the work release program imposed as a condition of probation and argues that this court should vacate the balance of the term of probation since it serves no useful public purpose.

The record discloses that the trial court gave consideration to all matters of the case, including those brought out in aggravation and mitigation, in arriving at the sentence imposed. Defendant not only threatened the victim of the instant offense, but also threatened his daughter and cut his son with the weapon. In deference to defendant's job status, the trial court altered its initial finding of 15 days outright incarceration as a condition of probation, to that of 30 days in the work release program. It appears that the trial court was in a superior position to determine the proper sentence to impose; this court will not interfere with that determination. (People v. Hamoton, 44 Ill.2d 41, 253 N.E.2d 385.) The case of People v. Callahan, 103 Ill.App.2d 350, 243 N.E.2d 624, cited by defendant in support of his position, must be limited to the circumstances peculiar to that case.

As above noted, the common law record and the finding of the trial court as evidenced by the report of proceedings indicate a conflict in the number of days to be served in the work release program as a condition of the defendant's probation; the common law record recites 15 days in the program, whereas the court's finding recites 30 days in the program. Defendant's claim that he was not released on bond pending appeal in this case has gone undenied by the State, so that defendant has apparently served the term to which he was sentenced in the work release program

during the pendency of the appeal. The question of whether the condition of probation was 15 days in the work release program or 30 days in the work release program is therefore moot.

For these reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Third Division. JUSTICE DEMPSEY did not participate.

No. 59921



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
NATHAN DOZIER (Impleaded),	)	JOHN HECHINGER,
Defendant-Appellant.	)	JUDGE PRESIDING.

Per Curiam: First District, Second Division
Before Hayes, P.J., Leighton and Downing, JJ.

On June 18, 1973, Nathan Dozier, defendant, entered a negotiated plea of guilty to an indictment charging him with the crime of murder (Ill. Rev. Stat. 1969, ch. 38, par. 9-1). He was sentenced to a term of 14 to 35 years.

Defendant wished to appeal and the Public Defender of Cook County was appointed to represent him. After examining the record, the Public Defender has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief in effect concludes that an appeal in this case would be wholly frivolous and without merit. Defendant was mailed copies of the motion and brief on May 29, 1974. He was informed he had until August 5, 1974 to file any additional points he might choose in support of his appeal. He has not responded.

The motion and brief filed by the Public Defender state that the only argument which could be raised on appeal is that the trial court did not fully admonish the defendant prior to accepting his plea of guilty. Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, par. 402) sets forth the procedure which must be followed by the trial court in accepting pleas of guilty. The Rule states:

"(a) Admonitions to Defendant. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of the determining that he understands the following:

- (1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;
- (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
- (4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

(b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

(c) Determining Factual Basis for Plea. The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea."

The Rule requires substantial compliance with its terms (People v. Reed, 3 Ill. App. 3d 293, 278 N.E.2d 524). The Illinois Supreme Court has indicated a realistic approach to the construction of the Rule. People v. Mendoza, 48 Ill. 2d 371, 270 N.E.2d 30.

In the case at bar, the record reflects that after a pre-trial conference had been held defense counsel, in defendant's presence, informed the trial judge that defendant wished to enter a plea of guilty. In response to questioning by the trial judge, the defendant stated that he had had an ample opportunity to discuss the matter with his attorney. The trial judge read the indictment to the defendant, who stated that he understood the

nature of the charge against him. Defendant was advised that he had a constitutional right to remain silent and that by entering a plea of guilty he was waiving that right. The trial judge advised defendant that by pleading guilty he waived the right to a jury trial or, in the alternative, to a bench trial. Defendant was informed of the possible statutory sentence for the crime of murder. Defendant stated that he understood there had been a pre-trial conference with the court and that upon a plea of guilty he would be sentenced to a term of 14 to 35 years. The facts which provided the basis of the charge were stipulated by the parties. Defendant persisted in his plea of guilty, which was then accepted. The admonishments by the trial judge were sufficient to constitute substantial compliance with Supreme Court Rule 402.

We have examined the record and concur in the opinion of the Public Defender that the argument thus raised does not have substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

Motion allowed;

Judgment affirmed.

(Publish abstract only.)



No. 59783

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
JAMES C. THOMPSON,	)	FRED G. SURIA,
	)	PRESIDING.
Defendant-Appellant.)	

PER CURIAM:

James C. Thompson, defendant, was found guilty after a bench trial of the crimes of aggravated battery and armed robbery in violation of sections 12-4 and 18-2 of the Criminal Code (Ill.Rev.Stat. 1971, ch.38, pars.12-4 and 18-2). He was sentenced to a term of five to eight years on each charge, the sentences to run concurrently. Defendant appeals, arguing (1) that the evidence failed to establish his guilt beyond a reasonable doubt, (2) that he was improperly convicted and sentenced for two offenses which arose out of the same course of conduct, and (3) that he was denied equal protection of the laws by section 2-7(1) of the Juvenile Court Act (Ill.Rev.Stat. 1971, ch.37, par.702-7(1)).

At trial, Drunell Davis testified that at 11:00 p.m. on July 14, 1972, she left Presbyterian-St. Luke's Hospital, where she is employed as a nurse's aid, on her way home. At approximately 12:15 a.m., she was walking in the vicinity of 87th and Ashland when she heard someone behind her. She testified that she turned around and observed the defendant following 10 to 15 feet behind her. She was walking down 90th Street and as she approached an alley near Loomis the defendant came up behind her and put a knife to her throat. Defendant demanded her purse and threatened to kill her. Defendant grabbed her arm and pushed her to the ground. She struggled with defendant, trying to keep the knife from her neck. The victim testified that when she was on the ground, she was able to see the defendant's face. Defendant again demanded her purse and she complied. She then stood facing defendant, who

ordered her to go down the alley. She testified that she immediately ran one-half block down the street to her home, where she called the police. There was a light on in the alley and another light at the corner. She described the lighting conditions as good. The victim testified that she had seen the defendant over 20 times previously in the neighborhood. A short time after her call, the police arrived at her home and took her to Little Company of Mary Hospital where she received three stitches for wounds in her hands and neck.

The victim testified that she told the police the man who robbed her was tall, black, bushy hair, red bloodshot eyes, wearing a green jacket. Later that same day, the police officers returned to her home and showed her six photographs. She identified a photograph of the defendant as the man who had robbed her. The following day she went down to the police station where she viewed a lineup of three men. She identified the defendant as the man who had robbed her.

On cross-examination, it was established that in previous testimony at the preliminary hearing and before the grand jury, the victim had testified that there were no lights on in the alley, but there were lights on at the corner. She had also testified that when she first turned around and saw the defendant, he was approximately one-half block behind her and that when the police first interviewed her, she did not tell them that she had seen the defendant previously in the area.

Daniel Benoit, a Chicago Police Officer, testified that on July 15, 1972, in the early morning hours he was assigned the investigation of the robbery of Drunell Davis. Officer Benoit testified that he gave Officer Parello six photographs of potential offenders to show the victim. She identified a photograph of the defendant as the man who robbed her. Defendant was then placed under arrest. The defendant's home is approximately three and a half blocks from the complainant's home.

Donald Parello, a Chicago Police Officer, testified for the defense that in the early morning hours of July 15, 1972, he responded to a call and had a conversation with Drunell Davis. Pursuant to this conversation, he made out a police report which described the offender as a male Negro, 18 to 20 years of age, five feet, eight inches tall, weighed approximately 190 pounds, hair black. Officer Parello testified that he did not have any independent recollection of his conversation with the complainant.

O. C. Thompson, the defendant's brother, testified that there is a grocery store located at the northeast corner of the intersection of 90th and Loomis. There are no windows on the side of the grocery store facing 90th Street. He testified that there was a street light at the mouth of the alley near the scene of the robbery.

It was stipulated that the defendant was six feet, three inches tall and weighed 175 pounds.

It was also stipulated that if Chicago Police Officer Sadler were called to testify, he would testify that on July 15, 1972, he was familiar with the area surrounding 90th and Loomis. At that time, there were light fixtures attached to the building housing the grocery store. There was also a street light at the corner of 90th and Loomis on the north side, and a second street light at the alley on 90th between Loomis and Ada.

It was also stipulated that if Milton Smith were called to testify, he would testify that he is the owner of the Certified store at 90th and Loomis. In July, 1972, there were lighting fixtures affixed to the side of the store. It was also stipulated that if Joseph Smith were called to testify, he would testify that he is the co-owner of the grocery store and that the lighting fixtures on the side of the store were set to turn off at 11:00 p.m. during the summer months.

Defendant's first contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because his identification by the complainant was insufficient. The sufficiency of the identification of an accused is a question for the trier of fact and courts of review will not reverse that decision unless the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. (People v. Catlett (1971), 48 Ill.2d 56, 268 N.E.2d 378; People v. DeSavieu (1970), 120 Ill.App.2d 45, 256 N.E.2d 80.) An identification by one eyewitness to a crime is sufficient to justify a conviction if positive and credible, even though contradicted by the defendant. People v. Bennett (1973), 9 Ill.App.3d 1021, 293 N.E.2d 687.

Defendant argues that the description which the complainant gave to the police immediately after the incident did not resemble the defendant and that certain discrepancies in the complainant's testimony established on cross-examination destroyed her credibility. Precise accuracy in describing a defendant's characteristics is unnecessary where the identification is positive. (People v. Miller (1964), 30 Ill. 2d 110, 195 N.E.2d 694.) Here, the complainant testified that as she was walking down the street, she heard someone behind her, turned and observed the defendant. Thereafter, in the area of 90th and Loomis, defendant grabbed the complainant. Defendant produced a knife and a struggle ensued, during which the complainant was pushed to the ground. She testified that at this time she again observed the defendant's face. After the defendant took her purse, she rose and again had an opportunity to observe the defendant's face. The complainant testified that she had seen the defendant previously in the neighborhood. This testimony provided a sufficient basis for the trial judge to conclude that the complainant had a sufficient opportunity to view the defendant so as to fix his identity. (People v. Wright (1973), 10 Ill.App.3d 1035, 295 N.E.2d 510.)

In addition, the complainant, within hours after the robbery, identified the defendant by photograph and the very next day, identified the defendant in a lineup held at the police station. Minor discrepancies and inconsistencies in the testimony of a witness such as those cited by the defendant in the case at bar, do not destroy the credibility of the witness, but affect only the weight to be given to such testimony. (People v. Reese (1973), 54 Ill.2d 51, 294 N.E.2d 288; People v. Strother (1972), 53 Ill.2d 95, 290 N.E.2d 201.) After a complete examination of the entire record, we find that the testimony of the complainant was positive, credible and sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant's second contention is that he was improperly convicted and sentenced for both aggravated battery and armed robbery since both crimes arose out of the same course of conduct. The State in its brief agrees that both crimes arose out of the same course of conduct. Under these circumstances, defendant could only be convicted and sentenced for one offense. (People v. Lilly (1974), 56 Ill.2d 493, 309 N.E.2d 1.) Defendant's conviction for aggravated battery must therefore be reversed.

Defendant's final contention is that he was denied equal protection of the laws by section 2-7(1) of the Juvenile Court Act (Ill.Rev.Stat. 1971, ch.37, par.702-7(1)), which provided that no male under the age of 17 nor female under the age of 18 may be prosecuted for an offense under the laws of the State of Illinois. In the recent case of People v. Ellis (1974), 57 Ill. 2d 127, 311 N.E.2d 98, the Illinois Supreme Court held that section 2-7(1) of the Juvenile Court Act was invalid. However, the court went on to hold that the effect of this invalid classification was to render the statute inapplicable to both males and females who were not "under the age of 17 years." Under these circumstances, the failure to treat defendant as a juvenile did not deny him equal protection of the laws.

Accordingly, the judgment and sentence of the circuit court of Cook County, finding defendant guilty of aggravated battery, is reversed; the judgment and sentence of the circuit court of Cook County, finding defendant guilty of armed robbery, is affirmed.

Affirmed in part;
reversed in part.

Third Division. JUSTICE DEMPSEY did not participate.

NO. 59135



8/27/74
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PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
vs.)
)
JAMES W. JOHNSON,)
)
Defendant-Appellant.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
NATHAN J. KAPLAN,
PRESIDING.

Per Curiam: First District, Second Division.

Before Hayes, P.J., Leighton and Downing, JJ.

James W. Johnson, defendant, was found guilty after a bench trial of the offense of theft in violation of section 16-1(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 16-1 (a)(1)). He was sentenced to a term of one year in the House of Correction. Defendant appeals, arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, Vernet Jenkins testified that he is the owner and operator of the Shell gas station at 3759 West Chicago Avenue, Chicago, Illinois. Defendant was employed by him at the station. Jenkins testified that on September 28, 1972, he left the gas station at 1:30 A.M., leaving defendant in charge. He returned to the station at 8:30 A.M. and found that his office in the station had been broken into. Missing were \$500 in cash and a quantity of trading stamps. Entry was gained into the office by removing a small window which had then been replaced. Jenkins testified that he did not at any time give defendant permission to enter his office.

John Henderson testified that during the early morning hours of September 28, 1972, he went to Jenkins' gas station to make a telephone call. At that time, defendant asked if he wanted to make some easy money. Henderson testified that

pursuant to defendant's instructions, he watched the front of the station while defendant removed the window to Jenkins' office and gained entry. Defendant took money and a quantity of trading stamps out of the office. Henderson testified that defendant gave him \$50 and he left the station. On cross-examination, Henderson testified that he had been arrested for this theft on October 7, 1972. Henderson testified that he had not been made any promises by the prosecutor or the police officers.

James W. Johnson, defendant, testified that on September 28, 1972, between 1:30 and 8:30 A.M., he was in charge of Jenkins' gas station. During those hours, he took in approximately \$200, which he subsequently turned over to Jenkins prior to going off duty. Defendant denied ever breaking into Jenkins' office or taking any money therefrom. Defendant testified that, during the entire time he worked at the gas station, he had never been in Jenkins' office.

In rebuttal, Vernet Jenkins testified that defendant had been in his office on at least three occasions when there was money present in the office.

Defendant's only argument on appeal is that the evidence was insufficient to establish his guilt beyond a reasonable doubt, because the testimony of Henderson, an accomplice, was improbable and contradictory. The rule is well established that it is the function of the trier of fact to weigh testimony, judge the credibility of witnesses, and determine factual matters. Only where the evidence is so unsatisfactory as to leave a reasonable doubt of defendant's guilt will the finding of the trial court be disturbed. (People v. Hampton, 44 Ill. 2d 41, 253 N.E. 2d 385.) Although the testimony of an accomplice is received with caution, such testimony, even if uncorroborated, is sufficient to sustain a conviction. People v. Brown, 51 Ill. 2d 271, 281 N.E. 2d 682; People v. Lockett, 6 Ill. App. 3d 867, 286 N.E. 2d 809.

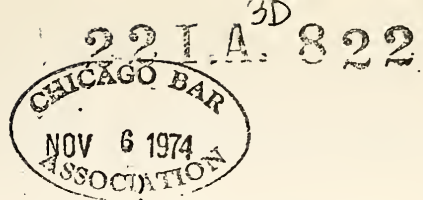
In the case at bar, the testimony of Jenkins established that on September 28, 1972, between 1:30 A.M. and 8:30 A.M., the office in his gas station was broken into by removing the window. Currency and trading stamps were taken from the office. During this time, defendant was in charge of the station. Henderson testified that, during the early morning hours of September 28, 1972, he went to Jenkins' gas station to make a telephone call. At that time, defendant asked him if he wanted to make some money. Henderson testified that, while he kept a watch, defendant removed the window and gained entry into Jenkins' office. Defendant then took money and trading stamps out of the office. Defendant gave Henderson \$50. While Henderson was an accomplice and was awaiting trial on this charge, these facts were made clear to the trial judge. After seeing and hearing all of the witnesses, the trial judge found that defendant's guilt had been established beyond a reasonable doubt. After a complete review of the entire record, we find that the trial court's finding is amply supported by the evidence.

Defendant's testimony that he did not have any part in the burglary of Jenkins' office does not create a reasonable doubt as to his guilt, since a trial judge is not obliged to believe a defendant's testimony. People v. Kaprelian, 6 Ill. App. 3d 1066, 286 N.E. 2d 613.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

Publish abstract only.



THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY

v.

IKE SANDERS,

) HON. KENNETH R. WENDT,
) JUDGE PRESIDING.

Defendant-Appellant.)

Mr. JUSTICE BURMAN delivered the opinion of the court.

On November 12, 1971, following a trial without a jury the defendant, Ike Sanders, was found guilty on a charge of aggravated battery. He was sentenced to five years probation, the first year to be served in the House of Correction.

On appeal he contends (1) a reasonable doubt of his guilt exists because of various contradictions in evidence, a lack of investigation by the police of certain key facts, and a misunderstanding of evidence by the trial court judge and (2) he was not given a proper hearing in aggravation and mitigation.

The record undisputedly shows that the defendant shot and wounded one Raymond Perry on March 13, 1971, hospitalizing him for eleven days. The defendant claims it was done in self-defense.

We summarize the evidence. Raymond Perry testified for the State that on the morning of March 13, 1971, the defendant made an uninvited visit to the apartment at 227 South Central Avenue in Chicago in which Perry was living with his wife and his sister. The defendant, a friend of Perry's sister, was the one who had originally rented the apartment. When the defendant arrived at about 10:30 A. M. on March 13, Perry was eating breakfast. The defendant told him he wanted him out of the apartment by the 15th of the month, but he replied that he was paying the rent and would not get out. At this time Perry was seated at the dining table with his back to the defendant. His wife screamed and he turned and saw that the defendant had a gun pointed at him. The defendant shot him once as he rose from the chair in an attempt to hide

behind the dining room partition. He said he had nothing in his hands when he stood up.

Perry's wife, Eloise, testified that her husband and the defendant had words. She screamed when the defendant pulled a gun. Her husband looked around and the defendant shot him as he began to leave the table. She also stated that her husband had nothing in his hands at the time he was shot.

The defendant, Ike Sanders, testified that he and Perry had an argument while Perry was sitting at the table, eating. Perry then got up from the table holding a knife approximately a foot long in his right hand. The defendant pulled the gun. Perry lunged at him, so the defendant shot him. It is uncontroverted that the defendant had come to the apartment with a gun and left after the incident.

The contradictions in evidence which the defendant contends contribute to the presence of reasonable doubt of his guilt relate to the testimony of the complainant, Raymond Perry, and his wife, Eloise, regarding the exact place where Perry was shot. The defendant claims the testimony is conflicting as to whether the complainant was shot at the table while getting off the chair or while attempting to dodge behind a wall. We have examined this testimony in full and find no material discrepancies. Indeed, we are inclined to agree with the State that whether the complainant was shot as he "turned," "raised up," or "dodged" is a matter of insignificant semantic difference, with little discernible relevance to the defendant's claim of self-defense, and certainly not crucial to it. The defendant further finds inherent incredulity in the testimony of the complainant and his wife that there was no knife on complainant's breakfast table, urging that it is "extremely unusual and extremely improbable that a person will sit down to a sausage breakfast (even a soft sausage breakfast) with no knife present." We do not find this testimony so beyond the bounds of

universal human experience that it should be discarded as a matter of law, and rather think its evaluation is better left to the trier of the fact. As stated in People v. Novotny, 41 Ill.2d 401, 412, 244 N.E.2d 182, 188:

"It is neither the duty nor the privilege of a reviewing court to substitute its judgment as to the weight of disputed evidence or the credibility of witnesses for that of the trier of fact who heard the evidence presented and observed the demeanor of the witnesses***."

It is also asserted that the trial judge misunderstood the evidence as to the amount of time which elapsed between the time of the shooting and the time the defendant turned himself in to the police and that this weighed heavily in the finding of guilty. The defendant said he surrendered 45 minutes after the shooting at the Eleventh District Police Station. The only evidence in the record independent of the defendant's testimony on this point was supplied by Officer Leonard who testified that Sanders was brought from the Eleventh to the Fifth District Police Station at 2:00 P. M., or approximately four and one-half hours after the shooting. There is no other indication when Sanders actually surrendered to the police. In making his finding of guilty, the judge commented:

"It is who do you believe. Those three people know. What has been proven in court is that the man did it and the man committed it, as far as I can see. Had he stayed there when Officer Manion came up and said, yes, I shot him, there is the knife he pulled on me, he may have had a defense. But Lo and Behold, he goes away for some four or four and a half hours, according to the officer.*** So from 9:30 to 2:00 o'clock, nobody knows about the knife until then. Now, for that reason I have to think that the man is not telling the truth here. I have to believe there was not a knife and therefore there will be a finding of guilty***. "

We feel that the crucial fact expressed by the trial judge was not necessarily the exact amount of time which elapsed between the shooting and the defendant's surrender, but rather that the defendant fled and precluded any police recovery of the knife allegedly wielded by the complainant. There is therefore

no reason for us to disregard the trial court's finding, which is essentially based on the credibility of the witnesses observed at the trial.

What the defendant terms his "strongest contention" is that he was not given a proper hearing in aggravation and mitigation nor allowed time to prepare for the same, to bring in family witnesses, employment records, community records, and other testimony. He cites People v. Bradford, 1 Ill.App.3d 38, 272 N.E.2d 259, for the proposition that "the trial judge has a responsibility following a plea of guilty, and despite waiver by the People and defendant and absent other means of securing such information through hearing on petition for probation or statements into the record, to sua sponte require information on the record by whatever means seems appropriate *** for the exercise of his sentencing responsibility and to provide a basis for sentence review." 1 Ill.App.3d at 42, 272 N.E.2d at 261.

The record here shows that not only was a hearing actually held, but that no continuance was requested by the defendant's trial counsel to allow him to prepare other matters in mitigation. Indeed when the court asked the defendant's attorney whether he wished "to say anything more," he replied "No." As stated by the Illinois Supreme Court in People v. Nelson, 41 Ill.2d 364, 369, 243 N.E.2d 225, 228:

"The defendant waived his right to be further heard at the mitigation hearing and it was neither necessary nor appropriate [for the appellate court] to remand for further hearing. To hold otherwise would permit a defendant to stand silent and, if not pleased with his sentence, later invoke the aid of an appellate tribunal to secure a reduction in sentence."

In any event, the Bradford case relied upon by the defendant is not in point since there not only did both sides waive any hearing in aggravation and mitigation, but a plea of guilty was entered, and there was thus no objective criteria at all on which the trial judge could have based his sentence.

We finally consider a motion by the State, filed subsequent to oral argument in this case, to cite supplemental authority. The motion calls our attention to the fact that as of January 1, 1973, the Unified Code of Corrections (Ill.Rev.Stat.1973,ch.38, par.1001-1-1 et seq.) became applicable to this appeal. (People v. Harvey, 53 Ill.2d 585, 294 N.E.2d 269.) It further points out that, under the Unified Code as it applies to this defendant, before amendment, the split-sentence of one year imprisonment as a condition of the five year probation is illegal. [See section 5-6-3(d) of the Unified Code of Corrections prior to amendment effective November 14, 1973, Ill.Rev.Stat., 1972 Supp., ch.38, par. 1005-6-3(d); People v. Grant, ___ Ill.2d ___, 312 N.E.2d 276; People v. Mahle, ___ Ill.2d ___, 312 N.E.2d 267; People ex rel. Weaver v. Longo, 57 Ill.2d 67, 309 N.E.2d 581.] Accordingly we vacate the one year imprisonment term imposed as a condition of the five year probation.

The judgment of the circuit court is affirmed as to the conviction and the cause is remanded to the trial court with directions to resentence the defendant within the limitation of the probation provisions of section 5-6-3 (d) of the Unified Code of Corrections [Ill.Rev.Stat., 1972 Supp., ch.38, par.1005-6-3(d)].

Affirmed and remanded with directions.

(Abstract only.)

Dieringer and Johnson, JJ.,
concur.



59990

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Respondent-Appellee,	)	Circuit Court of
	)	Cook County,
vs.)	
	)	Honorable
ARTHUR COKEs,	)	Reginald Holzer,
Petitioner-Appellant.	)	Presiding.

BEFORE McNAMARA, P.J., DEMPSEY AND McGLOON, JJ.

PER CURIAM:

Arthur Cokes (petitioner) was found guilty by a jury of the offense of murder and sentenced to a term of 21 years to 28 years; the judgment was affirmed in People v. Cokes, 106 Ill.App.2d 139, 245 N.E.2d 507. His subsequently-filed petition for relief under the Illinois Post-Conviction Hearing Act was dismissed without an evidentiary hearing. Ill.Rev.Stat. 1971, ch. 38, pars. 122-1 et seq. On this appeal from that order of dismissal, he contends that the trial court improperly dismissed the petition which alleged that the State at trial had knowingly suppressed evidence concerning the mental condition of its prime witness and which was supported by evidence.

It appears that State's witness Alice Hall was the sole eyewitness to the homicide; she had known petitioner for several years prior to the homicide and had been drinking with his wife and others in his apartment for two days prior thereto. Miss Hall had intended to go to sleep in a rear bedroom in the apartment, where she was joined by the deceased, a male. Upon her request, petitioner later entered the bedroom, dragged the deceased from the bed and "stomped" him; Miss Hall thereafter heard a "ping", and petitioner

waved a gun at her; she observed the deceased lying on the floor, and also observed petitioner dragging the deceased from the room as she "peeked out" from under the bedclothes covering her head. Petitioner had testified that he had known Miss Hall a period of ten years prior to the date of trial; he denied killing the deceased and stated that his (petitioner's) wife told him upon his return from work and finding the deceased's body that she shot him during a fight; he testified that he at that time attempted to speak to Miss Hall but that she was "too drunk to say anything." The deceased had been shot through the head and had suffered a deep cut in the throat; petitioner's wife could not be located at the time of the trial. In resolving the conflict in the evidence, this court stated in the opinion that it was "readily apparent" that the jury had rejected as incredible petitioner's version of the incident and had accepted as true the version of Miss Hall.

The post-conviction petition was filed subsequent to the decision in the direct appeal from the judgment and alleged that Miss Hall had a history of mental disturbance and that although the State had known of that fact at the time of trial it had not disclosed such fact to petitioner. The petition, filed by retained counsel, was neither verified nor accompanied by affidavit, records or other evidence, nor did it account for the absence of such matters. Respondent filed a motion to dismiss the petition on the ground that it failed to allege a violation of petitioner's constitutional rights.

At the hearing on the motion to dismiss the petition, it was brought out by petitioner's counsel that he had learned by subpoena

of hospital records that Miss Hall had been in State mental hospitals for an alcohol-related mental condition, the hospitalizations pre-dating the trial of the cause, and that, specifically, she had been transported to a State mental hospital by the police on a date prior to the trial. It was the position of the petitioner that a hearing should be held on the question of whether the State "knew or should have known" of Miss Hall's prior mental condition, it being petitioner's further position that the State had a duty to inquire into the mental background of all State's witnesses in all cases and to disclose such information to the accused where appropriate; petitioner argued that it should also be determined at the requested hearing whether the failure of the State to disclose such information circumscribed the trial of the case; petitioner's counsel further admitted that Miss Hall had never been adjudicated an incompetent. In dismissing the petition without an evidentiary hearing, the trial court held that the imposition of such duty upon the State, to determine the mental background of all State's witnesses, would impose unreasonable personnel and budgetary burdens upon the State.

Petitioner here contends that knowledge by the police and by the State mental health authorities of Miss Hall's mental condition prior to the trial of the case must be imputed to the prosecution on the theory of agency; he argues that under the case of Brady v. Maryland, 373 U.S. 83, petitioner's constitutional right to due process was violated by the State's failure to disclose that information to him for impeachment purposes, in light of the close nature of the evidence adduced at the trial of the case.

The Brady case requires that the prosecution disclose, upon request by the accused, such evidence in its possession as is favorable to the accused and material to the question of guilt or punishment. Brady v. Maryland, 373 U.S., at 87. The instant post-conviction petition does not allege, nor does it appear from the record, that petitioner at any time requested such information from the prosecution. The petition was neither verified nor otherwise supported by affidavit, records or other evidence from which it could be concluded that the prosecution was actually aware of Miss Hall's mental condition. (See Ill.Rev.Stat. 1971, ch. 38, par. 122-2.) The fact that Miss Hall had been in State-controlled institutions and transported on one occasion to such institution by the police does not, of itself, impute knowledge of such circumstances to the prosecution; Miss Hall's mental history had no direct connection with the instant offense and it would be unreasonable to impose upon the State the duty of securing the mental background of each of its prospective witnesses in every case. Finally, petitioner appears to have been in a much better position at trial to have raised the question of Miss Hall's mental condition, since he had known her for ten years prior thereto and was aware of her intoxicated condition on the date of the homicide.

The case of People v. Martin, 46 Ill.2d 565, 264 N.E.2d 147, cited by petitioner, is not applicable to the instant circumstances. There, the prosecution was held to have been aware of the false trial testimony of one of its police officer witnesses, on an agency theory. No such relationship exists between the prosecution and the State mental agencies or the police who transported Miss Hall to

the hospital for purposes unrelated to the instant case; if, as noted by the United States Supreme Court in Moore v. Illinois, 408 U.S. 786, at 795, there is no known requirement that the prosecution make a complete and detailed accounting of all police investigatory work on a case, the prosecution certainly cannot be held to be accountable to an accused for actions of other State agencies on matters unrelated to the circumstances of a case at hand.

For these reasons the order of the circuit court of Cook County dismissing the post-conviction petition is affirmed.

ORDER AFFIRMED.



3D
22 I.A. 1075

No. 59437

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Plaintiff-Appellee,)	CIRCUIT COURT OF
vs.)	COOK COUNTY.
JOHN MONTGOMERY,)	HONORABLE
Defendant-Appellant.)	EARL E. STRAYHORN,
	PRESIDING.

PER CURIAM:

John Montgomery, defendant, was charged by Indictment 71-2933 with armed robbery (Ill.Rev.Stat. 1971, ch.38, par. 18-2) and by Indictment 71-2999 with attempt armed robbery and aggravated battery (Ill.Rev.Stat. 1971, ch.38, pars.8-4 and 12-4.) On March 16, 1973, defendant entered a negotiated plea of guilty and was sentenced to a term of four to twelve years on the charge of armed robbery, four to twelve years on the charge of attempt armed robbery and one to ten years on the charge of aggravated battery, the sentences to run concurrently. Defendant appeals, arguing that the trial court, in accepting his plea of guilty, failed to admonish him pursuant to Supreme Court Rule 402 of his right to plead not guilty or to persist in that plea if already entered.

Initially, we have observed that in Indictment 71-2999 defendant was convicted and sentenced for both attempt armed robbery and aggravated battery. The State, in its brief, concedes that both crimes arose out of the same course of conduct. After an independent review of the record, we also conclude that the facts which constituted the offense of aggravated battery were not independently motivated or otherwise separated from the conduct which constituted the offense of attempt armed robbery. Under these circumstances, defendant could properly be convicted and sentenced for only one offense. (People v. Lilly, 56 Ill.2d 493, 309 N.E.2d 1.) Defendant's conviction

for aggravated battery must therefore be reversed.

On March 16, 1973, when defendant's case was called, privately retained defense counsel, in defendant's presence, requested a pretrial conference with the court. After the pretrial conference was held, defense counsel, again in defendant's presence, informed the trial judge that after conferring with defendant and defendant's mother, who was present in the court, the defendant wished to enter a plea of guilty. Defendant, in response to questions by the trial judge, stated that it was his desire to enter a plea of guilty to both indictments, one charging attempt armed robbery and the other charging armed robbery. The trial judge carefully informed defendant as to the minimum and maximum possible penalties for armed robbery and attempt armed robbery. Defendant was advised that by entering a plea of guilty he waived his constitutional right to have his case heard by a jury of twelve people and his constitutional right to demand that the prosecution bring into open court all of the witnesses who will testify against him, have the witnesses sworn and testify under oath subject to cross-examination by defense counsel. Defendant stated that he understood that there had been several pretrial conferences with the court and that upon a plea of guilty he would be sentenced to a term of four to twelve years on each charge, the sentences to run concurrently. Defendant stated that no force, duress, threats or promises had been used to induce him to enter a plea of guilty. The facts which provided a basis for both indictments were stipulated to by the parties. Defendant persisted in a plea of guilty which was then accepted.

Defendant argues that the trial court failed to comply with Supreme Court Rule 402 in that the trial judge did not admonish him of his right to plead not guilty and persist in that plea if already entered. Supreme Court Rule 402 requires only substantial compliance with its terms. (People v. Reed, 3 Ill.App.

3d 293, 278 N.E.2d 524.) The Illinois Supreme Court indicated a realistic approach to the construction of the rule. People v. Mendoza, 48 Ill.2d 371, 270 N.E.2d 30.

In People v. Guy, 7 Ill.App.3d 935, 288 N.E.2d 712, the defendant was convicted of voluntary manslaughter upon his plea of guilty. On appeal, defendant argued that the trial court failed to comply with Supreme Court Rule 402 in that the trial judge did not admonish him that he had a right to enter a plea of not guilty and persist in that plea if already entered. Prior to entering his plea of guilty, defendant was admonished as to the nature of the charge, his right to a jury trial, his right to confront witnesses, and of the maximum and minimum possible penalties for the crime charged. This court rejected defendant's contention, holding:

"In this regard, our review of the record clearly indicates to us the trial court issued adequate admonitions to defendant concerning the nature of the charge and consequences of the guilty plea. This is the purpose of the subsection, and there was substantial compliance."

In the case at bar, the trial judge informed the defendant of the crimes charged and determined that there was a factual basis for each of the charges. Defendant was advised of the possible minimum and maximum penalties and that by entering a plea of guilty he waived his right to a trial by jury and his right to confront the witnesses against him. Defendant stated that he was entering a plea of guilty voluntarily and that no threats, promises or coercion had been used to induce him to enter his plea of guilty. Although at the time defendant entered his plea of guilty he was only 18 years of age, his mother was present in court and he had conferred with her. Defendant was represented by privately retained counsel. There is nothing in the record which would in any manner indicate that defendant did not understand exactly what he was doing at all times. An examination of the defendant by the Psychiatric Institute of the Circuit Court of Cook County which

was conducted prior to trial found that he was competent to stand trial. Under these circumstances, we conclude that the trial judge substantially complied with Supreme Court Rule 402 in accepting defendant's plea of guilty which was voluntarily entered.

Accordingly, the judgment and sentence of the circuit court of Cook County, finding defendant guilty of aggravated battery, is reversed; the judgments and sentences of the circuit court of Cook County, finding defendant guilty of armed robbery and attempt armed robbery, are affirmed.

Affirmed in part;
Reversed in part.

Third Division. Mr. Justice Dempsey did not participate.

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